United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

No. 23,978

984

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED STATES SMELTING, REFINING AND MINING CO., AND ITS WHOLLY OWNED SUBSIDIARY, MUELLER BRASS COMPANY,

Intervenors.

On Petition for Review of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF ISSUES PRESENTED

Whether the Board properly dismissed the complaint alleging that the Company violated Section 8(a)(3), (5) and (1) of the Act by failing to comply with the Union's alleged request for continuation of security trust fund coverage during the strike and by failing to supply information allegedly requested by the Union.

In accordance with Rule 8(d) of the General Rules of this Court the Board states that this case has not been before this Court previously.

REFERENCES TO RULINGS

The decision and order of the Board sought to be reviewed here issued on December 9, 1969, are reported at 179 NLRB No. 159, and are reprinted at A. 410-431.[1] The Board's unreported order denying the motion for reconsideration issued on January 29, 1970, and is reprinted at A. 432.

COUNTERSTATEMENT OF THE CASE

This case is before the Court on petition of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, to review an order of the National Labor Relations Board, issued on December 9, 1969, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), dismissing a complaint issued against United States Smelting, Refining and Mining Co., and its wholly owned subsidiary, Mueller Brass Company (the latter referred to as the "Company" hereinafter). The Company has intervened in this proceeding. This Court has jurisdiction under Section 10(f) of the Act.

I. THE BOARD'S FINDINGS OF FACT

The Company is engaged in the manufacture and sale of brass mill products, forgings, aluminum products and related items (A. 410). On

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[1] "A." references are to the Appendix. References preceding a semicolon are to the Board's findings; those following are to supporting evidence.

December 23, 1966, UAW, Local 412 (hereinafter referred to as the "Union" or Local 412) was certified as the collective bargaining representative of the approximately 70 salaried technical employees at the Company's Port Huron plant, the unit involved in this proceeding (A. 412, 413; 8, 28, 68-69, 174, 180). The Company also employs about 1800 production and maintenance employees who have been represented by UAW, Local 44 (hereinafter referred to as Local 44), since 1942. A group of mechanical or skilled craftsmen are also employed by the Company; they have been represented by International Association of Machinists, Local 218, since 1940 (A. 412; 148-149, 189).

The Company carries and pays the entire cost of a group insurance policy covering all of its employees. All employees are also covered by various medical and hospitalization policies maintained by the Company (A. 412; 104-106, 112).[2] In addition, the Company has available for salaried employees two types of pension plans – a limited plan, which is available as soon as a salaried employee joins the Company; and the Security Trust Fund, which is open to those salaried employees who meet certain eligibility requirements (A. 412; 106-107, 111-114).[3] The latter, in addition to providing for retirement and disability payments, provides a death benefit payable to an employee's beneficiary in the event of an employee's death before retirement (A. 412; 602, 287, 301-309, 321). The pension aspect of the Security Trust Fund is covered by a contract between the Company and Massachusetts Mutual Life Insurance Company while,

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[2] More extended coverage under these policies is available to employees on an optional basis at their own expense (A. 412; 105).

[3] Basically, an employee must have attained age 30 and have completed 5 years of continuous service with the Company to be eligible for the Security Trust Fund (A. 271-272). Once an employee has chosen to join the Security Trust Fund, the other pension plan ceases to operate (A. 114).

since 1967, the death benefit is afforded pursuant to a contract between the Company and the Prudential Insurance Company of America (A. 412, 413; 111, 207, 271, 321, 301, 311). The cost of the Security Trust Fund coverage is defrayed in part by the Company and in part by the employee himself through payroll deductions (A. 412; 103-104, 106-107, 196-200, 207). While the employees and the Union did not have a copy of the Company's insurance contract with the carrier (A. 413; 301-309, 40, 51),[4] each employee did receive an insurance certificate which accurately described the insurance contract by pointing out that his group life insurance would "automatically terminate" upon "termination of employment," which the certificate defined as "when an Employee ceases to be actively engaged in work on a full-time basis with the Policyholder" (A. 19, 110-111, 305, 313). Moreover, each employee also received a booklet which pointed out that the death benefit is covered by an insurance contract separate from that covering retirement or disability benefits, and that insurance "ceases because of retirement or termination of employment" (A. 413; 321, 22, 40-41). Cf. pp. 4-5, 13-14 of the Union's brief.

Between February and August 1967, the Company negotiated for a collective bargaining agreement with Local 412 (A. 413). Bargaining sessions took place about once, and sometimes twice, a week during that period of time (A. 38, 98, 178). The chief negotiator for the Company was

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[4] At the hearing, a conflict arose as to whether a copy of the Security Trust Fund Master Agreement was requested by the Union (A. 24-25, 99-100, 108, 135-137, 138-139, 143, 154, 163-164, 175-177, 179, 186). The Trial Examiner found that during the 1967 negotiations, no such request was made by the Union (A. 423-424; see *infra* pp. 19-21). It was established that a request was made by the Union for a copy of the master agreement in July 1968, after Racely's death, *infra*, p. 8, and that this request was promptly honored by the Company (A. 24, 143-144, 155-156, 164, 186). It also appears that during the 1967 negotiations the Union requested and received a copy of a pamphlet describing a new voluntary group accident insurance plan for salaried employees (A. 54-55, 136-137, 170-171, 177, 353-357(2)).

John Williams (A. 174); UAW international representative Alex McIntyre along with a committee selected by the employees represented Local 412 (A. 21-22). The Security Trust Fund was one of the subjects discussed during the negotiations, the parties agreeing to incorporate the plan unchanged in whatever collective bargaining agreement was reached (A. 430, n. 2, 423; 39, 28, 42-44, 46, 50, 55-56, 109, 124, 139, 141, 178-186). However, while agreements on this and other areas were reached, the parties were unable to achieve final agreement on all points and a contract was not signed (A. 423). Bargaining resumed in early 1968 and lasted through April, but again the parties failed to reach agreement (A. 413).

At about this time, the Company was also engaged in bargaining with Local 44, representative of the production and maintenance employees (A. 413-414; 65, 144). On April 29, 1968, a negotiating session took place between the parties which lasted throughout the night and ended with the announcement that the production and maintenance employees would go out on strike (A. 413-414; 27, 65, 144, 187-188). As the meeting was breaking up, McNeil, president of Local 44, requested the Company to continue in effect the insurance coverage for the production and maintenance employees while they were on strike; in his request, he specified that he was referring to the "life insurance, sick and accident insurance and health insurance" (A. 414-415; 28, 144-145, 156, 188, 204). Williams, who was chief negotiator for the Company in the Local 44 negotiations, responded that if the union would reimburse the Company for the premiums in a lump sum, the policies could be kept in effect (A. 414; 29, 145, 189, 204).[5] McNeil stated that this arrangement would be acceptable (A. 414; 145, 189).

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[5] The Company had previously declined a request by IAM Local 218 to allow individual payments because of the administrative problems which such arrangements would have created (A. 412; 189-190). The craftsmen represented by IAM Local 218 were already on strike by the end of April 1968 (A. 413; 148-149, 189-190).

McIntyre was present at the April 29 meeting as an observer for Local 412, which had decided to join the strike. Following this conversation, McIntyre requested continuation of insurance coverage for the salaried employees as well (A. 429, 414-415; 27-29, 65-68, 146, 190, 204-205). McIntyre specifically referred to life and hospitalization insurance (as had McNeil) but did not mention the Security Trust Fund death benefit, for which only some of the salaried employees were eligible (A. 429, 414-415, 419; 28-29, 30, 66-68, 190-191, 204-205, and see A. 146, 156). Williams stated that the Company would keep the policy in effect on the same basis as discussed with McNeil, and McIntyre agreed (A. 429, 414-415; 29, 68, 146, 190).

At 9 o'clock on the morning of April 30, the salaried as well as the production and maintenance employees went on strike (A. 412; 27-28, 68, 148-149). That morning, Ivon Booth, a member of Local 412's negotiating committee, went to speak with George Waters, the Company's labor relations manager,[6] to inquire about insurance coverage during the strike (A. 430, 415, 421; 101, 166-167). Booth, who was not informed of the arrangement previously made (A. 115-117), asked whether the Company was going to "pick up [Local] 412's insurance along with [Local] 44's," and stated that it was his understanding that the local was prepared to pay the premiums (A. 415, 421; 101-103, 166-167, 168-169). When asked specifically what would happen to the Security Trust Fund coverage during the strike, Waters, who was also unaware of the arrangements made between the Company's chief negotiator and McIntyre (A. 169), responded that he understood that only the regular group life insurance would be

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[6] Waters had a subordinate position to Williams, the director of industrial relations and chief negotiator for the Company (A. 173-175).

continued but that he would try to find out and let Booth know (A. 430, 415-416, 421; 101-103, 166-167, 168-169).

Shortly after the strike began, Williams and McIntyre reported the arrangements which had been made to their respective insurance departments (A. 62-63, 191-192, 210). Under the terms of the life insurance portion of the Security Trust Fund, coverage ceases upon termination of employment which is "deemed to occur when an employee ceases to be actively engaged in work on a full time basis with the [Company]" (A. 420; 305, 313, see also A. 321).[7] However, while no payments under the Security Trust Fund were made by the Company (A. 429; 157-158, 160, 192-193), coverage under the regular group life and health insurance policies was maintained as agreed, with the Company paying the premiums and billing the Union therefor (A. 429, 423; 117-118, 122-123, 149, 152, 193-194).[8] The invoice sent to the Union for reimbursement specifically identified the type of insurance being continued; the insurance connected with the Security Trust Fund was clearly not included (A. 430, 423; 119-120, 149, 152-153, 360, 368, see *infra*, pp. 18-19).[9] No representative of the Union ever

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[7] The plan also provides:

> However, in the case of Employees who are disabled, granted a leave of absence, temporarily laid off, placed on a part-time employment basis or retired, the Policyholder may, acting on a basis precluding individual selection, consider such Employees as still employed on a full-time basis for a limited period as specified in the Employee Group Life Insurance provisions of the Group Policy.

[8] The record indicates that the Company also billed Local 412 for major medical coverage, which was tied into hospitalization but was not available to the production and maintenance employees at that time (A. 157, 169, 205).

[9] This exclusion was also made clear by the figures on the individual "breakdown tab run" enclosed with the invoices (A. 430, 423; 123, 149-150, 153, 361-363, see *infra*, pp. 18-19).

checked these bills to determine what type of insurance was being continued (A. 430, 423; 63-64, 68, 119, 121, 127, 150, 152-154).

On approximately June 1, 1968, Waters telephoned Booth to ascertain why the Union had been tardy in reimbursing the Company for the premium payments (A. 430; 103). During the conversation, Booth asked Waters whether any arrangements were going to be made for continuation of Security Trust Fund coverage and Waters answered that he still had not found out (A. 430; 103).

William Racely, a salaried employee who had participated in the strike from its inception, died on June 22, 1968 (A. 429, 411). Prior to the strike he had been covered by both the regular group life insurance policy and the Security Trust Fund (A. 411; 6-7). Racely's widow collected the full amount in connection with the regular group life insurance policy (A. 412, 421; 131-132). Mrs. Racely also tendered to the Company Racely's insurance certificate issued in connection with the Security Trust Fund, bearing the name of the pre-1967 insurance company (Massachusetts Trust) but with riders attached showing the name of the present insurance company (Prudential) (A. 134, 311, cf. Union brief p. 10, n. 10). However, because Racely's Security Trust Fund insurance policy had lapsed, she was not able to collect the death benefit provided therein (A. 429, 411; 131). The Company did offer Mrs. Racely reimbursement of her husband's contributions to the fund plus 2½ percent interest (A. 131-133).[10]

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[10] Shortly thereafter, employee Howard Currens inquired concerning continued Security Trust Fund coverage and offered to pay the entire premium for his own coverage to make certain that he would be covered while he was on strike (A. 416, 422; 73-76, 92-94). However, the particular Company representatives with whom Currens spoke were not able to help him (A. 416, 422; 73-76).

The strike ended on July 21, 1968, and on July 21 or 22, a contract settlement was reached, providing, *inter alia*, for continued coverage under the Security Trust Fund Plan (A. 412; 32). The Security Trust Fund insurance coverage of the striking employees who returned to work at that time was fully and immediately reinstated (A. 420; 161-162, 195-196).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Trial Examiner concluded that the Company understood the Union's request for continued coverage to include the Security Trust Fund and that, by failing to honor that request, the Company violated Section 8(a)(3) and (1) of the Act (A. 422). The Trial Examiner also found that, because cooperation with the Union would necessarily have entailed the production of Company records "intimately pertaining to the employees' condition of employment and necessary for the Union properly to look after its interests," the Company by refusing the Union's request, violated Section 8(a)(5) and (1) of the Act as well (A. 423).[11]

Disagreeing with the Trial Examiner's conclusion that the Company must have understood the Union's request for continued coverage as including the Security Trust Fund, the Board dismissed the complaint in its entirety (A. 428-131).

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[11] The Trial Examiner, however, declined to base a Section 8(a)(5) finding upon the Union's charges that the Company refused to produce copies of the Security Trust Fund master plan at its 1967 negotiating sessions, finding that no request for such document was ever made by the Union (A. 423-424).

ARGUMENT

THE BOARD PROPERLY DISMISSED THE COMPLAINT ALLEGING THAT THE COMPANY VIOLATED SECTION 8(a)(3), (5) AND (1) OF THE ACT BY FAILING TO COMPLY WITH THE UNION'S ALLEGED REQUEST FOR CONTINUATION OF SECURITY TRUST FUND COVERAGE DURING THE STRIKE AND BY FAILING TO SUPPLY INFORMATION ALLEGEDLY REQUESTED BY THE UNION

It is, of course, "axiomatic that [an employer] is not required to finance an economic strike against it by remunerating the strikers for work not performed." *General Electric Co.*, 80 NLRB 510, 511-512 (1948).[12] Since insurance premiums for employees are included within the definition of "wages" under the Act,[13] an employer is under no obligation to continue to pay such insurance premiums during the strike[14] and, indeed, is free to discontinue such insurance payments for striking employees, while continuing them for nonstrikers, without bargaining or even consulting with the union.[15] Similarly, where the amount of paid vacation is affected by the employee's length of service, in determining such vacation benefits an

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[12] Accord: *Illinois Bell Telephone Co.*, 179 NLRB No. 119 (1969); *Kimberly-Clark Corp.*, 171 NLRB No. 82 (1968); *Mooney Aircraft, Inc.*, 148 NLRB 1057, 1059 (1964), enf'd, 366 F.2d 809 (C.A. 5, 1966).

[13] *Mooney Aircraft, supra*, 148 NLRB at 1059; *W.W. Cross & Co., Inc.*, 77 NLRB 1162 (1948), enf'd 174 F.2d 875 (C.A. 1, 1949); *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 74 LRRM 2425, 2428 (C.A. 6, 1970); *Inland Steel Co.*, 77 NLRB 1, 3-6 (1948), enf'd, 170 F.2d 247, 253-255 (C.A. 7, 1948), cert. denied as to this point, 336 U.S. 960.

[14] *The Philip Carey Mfg. Co.*, 140 NLRB 1103, 1123 (1963), modified, 331 F.2d 720 (C.A. 5, 1964), cert. denied, 379 U.S. 888; *Ace Tank and Heater Co.*, 167 NLRB 663, 663-664 (1967).

[15] *Philip Carey, supra*, 140 NLRB at 1123; see also, *Kimberly-Clark, supra.*

employer need not take into account the time during which an employee was on strike.[16]

It must be stressed that the benefits withheld from the striking employees here did not include any amounts already accrued. To the contrary, the lapse in insurance coverage precisely corresponded with the period of the strike. Coverage was fully restored to those employees who returned to work at the conclusion of the strike, compare *Ace Tank and Heater Co., supra; Cone Brothers Contracting Co.*, 158 NLRB 186 (1966);[17] *Guenther d/b/a Pioneer Flour Mills v. N.L.R.B.*, 74 LRRM 2343, 2344, 2345 (C.A. 5, 1970); *C. B. Cottrell & Sons Co.*, 34 NLRB 457, 468-470 (1941),[18] and the amount of coverage, *i.e.*, two times an employee's annual salary, was unaffected thereby. Compare *Duncan Foundry and Machine Works*, 176 NLRB No. 31 (1969); *Great Dane Trailers, Inc.*, 150 NLRB 438, 439 (1964), affirmed, 388 U.S. 26 (1967); *Tex-Tan Welhausen Company*, 172 NLRB No. 93 (1968), enf'd., 419 F.2d 1265, 1271-1272 (C.A. 5, 1969), vacated and remanded, 397 U.S. 819; where the Board held that an employer violated Section 8(a)(3) of the Act by discriminating against striking employees with respect to those benefits which had already accrued to the employee because of the employment relationship.[19] Thus,

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16 *Illinois Bell, supra; Kimberly-Clark, supra; Mooney Aircraft, supra*, 148 NLRB at 1059; see also, *Roegelein Provision Co.*, 181 NLRB No. 72 (1970); *Quality Castings*, 139 NLRB 928, 930 (1962), set aside on other grounds, 325 F.2d 36 (C.A. 6, 1963), (similar rule as to profit sharing).

17 Modified in respects immaterial here, 161 NLRB 937 (1966).

18 Likewise, although this matter is not at issue here, an employee's status under the Security Trust Fund Pension Plan was fully restored after the strike (A. 33).

19 Indeed, the Board was careful to point out in *Great Dane* that it did not intend to disturb its holding in *General Electric, supra*, where "accrual of future benefits based on the performance of services or its equivalent, was allowed to nonstrikers but disallowed for strikers." 150 NLRB 1459, n. 2.

the Company's conduct in failing to pay the Security Trust premiums during the strike accorded with its obligations under the Act.[20]

The Union seeks to remove the instant case from the foregoing precedents by contending that it had requested the Company to continue the Security Trust Fund coverage during the strike and that the Company's disregard of this request violated Section 8(a)(3), (5), and (1) of the Act. However, the Board found that the factual predicate of this contention, i.e., a request by the Union which the Company must have understood as encompassing the Security Trust Fund, was simply not established by the evidence introduced (A. 429-430) and therefore found it unnecessary to determine what the Company's obligations would have been had such a request been made.[20a] The Union bases its attack on the Board's factual conclusions largely upon misconceptions as to the record evidence and the Examiner's and Board's credibility findings. Thus, the Union asserts (br., p. 19) that the Board

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20 Moreover, contrary to the Union's contention (Br., pp. 21, 3-5) the Company's conduct was perfectly consistent with the terms of the relevant provisions of the Security Trust Fund Plan. As noted by the Union, the Security Trust Fund provides that "in the event a member shall cease to be an Employee while continuing in the employ of the Company, he may continue his membership in the Plan for the year following his changes in status. Membership in the plan will terminate at the end of such year, if the former employee does not terminate his Membership during the year." (A. 273) However, this provision relates to the retirement and disability benefits afforded by the plan; the death benefit portion of the plan is governed by a separate contract entirely, which was not even in existence at the time that the Security Trust Fund agreement containing the provision quoted above was drawn up (A. 287, see also A. 321). It is the provisions of the insurance contract, not even alluded to by the Union, which are of course, relevant here. This insurance contract provides that coverage shall automatically terminate upon termination of employment; termination of employment is deemed to occur when an employee ceases to be actively engaged in work on a full-time basis with the Company (A. 305, 313). Furthermore, as shown *supra*, p. 4, the employees were not unaware of these termination provisions.

20a In the event that this conclusion is rejected, the Court should remand the case to the Board for determination of the Company's statutory obligations, if any, in the new factual context presented. See *International Ladies' Garment Workers' Union, AFL-CIO v. N.L.R.B.*, 112 U.S. App. D.C. 30, 33, 299 F.2d 114, 117 (1962).

"erroneously rejected" testimony by Booth, a union representative, that he "questioned [Labor Relations Manager] Waters in order to clarify in his mind, whether or not the Security Trust Plan was covered by the bill [as to which] Waters claimed ignorance" (citing A. 106). However, the Board expressly found (A. 430) that about June 1, "Waters telephoned Booth asking about the Union's tardiness in making the premium payments. At that time Booth again inquired about the Security Trust and Waters again said that he did not know."[21] (While, as the Union asserts (br., p. 19), the Board did not find that Booth was trying "to clarify in his mind, whether or not the Security Trust Plan was covered by the bill", Booth did not so testify; indeed, he admitted that he just received the bill and sent it on to the International, without having any questions for the Company as to its contents (A. 121)). The Union also asserts (br., pp. 18, 8, n. 8) that "The Board * * * either overruled or ignored the Trial Examiner's credibility resolution that Waters undertook to fully advise Booth about the status of the Security Trust Plan and that he never carried through on his word." However, the Board's decision (A. 430) specifically describes these conversations as related in Booth's testimony, which the Examiner credited (A. 421-422, 415-416; see *supra*, pp. 6-7, 8). The Union further asserts (br., p. 9, n. 9) that the Board "ignored" employee Currens' testimony about his efforts after Racely's death to pay the entire premium from his own pocket; yet the Board expressly reserved decision as to the Company's obligation, if any "to honor a request by an individual striking employee for continuation of his group insurance coverage at his expense" (A. 431, n. 3). In addition, the Union asserts (br., p. 16), "The Trial Examiner found that [union representative] McIntyre's request specifically included group life insurance and [Company negotiator] Williams knew it (A. 414). By finding otherwise, the Board has rejected uncontradicted evidence and has overruled [this] credibility resolution." However, the Board specifically found that the Union requested the Company "to continue in

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[21] The Examiner failed to mention this conversation.

effect certain group insurance policies" (A. 429); neither McIntyre nor anyone else testified that he in terms asked for continued coverage under the death benefit provisions of the Security Trust Fund (indeed, the Union contends (see *infra*, pp. 16-17) that he did not know enough about it to make such a specific request, br., pp. 7, 16-17, 34, and see the Examiner's decision at A. 421-422); and the Examiner's finding that the Company understood the Union's request as including the Security Fund death benefits was in terms based upon "Williams' conversation with McIntyre, Waters' talk with Booth, *and* [Waters'] later talk with Currens" after Racely's death (A. 422, emphasis supplied.)[22] The Board, however, disagreed, holding that the evidence credited by the Examiner simply did not establish that the Union's request was sufficiently clear that the Company must have understood it to include the Security Trust or its included death benefit; and found further that the Union's inaction in the face of clear indications by the Company that the request was not so interpreted, fully justified the Company in assuming that its interpretation was correct. As we shall show, this finding is entirely reasonable and well within the discretion accorded to the Board. *Oil, Chemical and Atomic Workers Int'l. Union, Local 4-243 v. N.L.R.B.*, 124 U.S.App.D.C. 113, 115-116, 362 F.2d 943, 945-946 (1966): "The Board is . . . the agency entrusted by Congress with the responsibility of making findings in cases arising under the statute, and it is not precluded from reaching a result contrary to the Examiner where there is substantial evidence in support of such result." Accord: *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 492-497 (1951); *Sign and Pictorial Union Local 1175 v. N.L.R.B.*, U.S. App. D.C. , , 419 F.2d 726, 733-734 (1969); *International Brotherhood of Electrical Workers, AFL-CIO v. N.L.R.B. (Sarkes Tarzian, Inc.)* (unreported officially), 70 LRRM 2287 (C.A.D.C., December 24, 1968, No. 21,932); *Rocky Mountain Natural Gas Co. v. N.L.R.B.*, 326 F.2d 949, 951 (C.A. 10, 1964);

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[22] The Union also attacks the Board's alleged reliance on the testimony of Baker, the Company's manager of industrial relations (Br., p. 19, n. 13). The Examiner merely mentioned his testimony, finding (in effect) that his testimony added nothing to that of McIntyre and Williams (A. 415); and the Board did not allude thereto.

N.L.R.B. v. Akin Products Co., 209 F.2d 109, 111 (C.A. 5, 1953). Compare, *Retail Store Employees Union Local 400 v. N.L.R.B.*, 123 U.S. App. D.C. 360, 360 F.2d 494 (1965).[23]

The focal point of our inquiry must, of course, be the request itself. The exact words used in the request are not seriously in dispute; it is conceded that union representative McIntyre never mentioned the Security Trust Fund but it is equally clear that he did refer to life and health insurance. The problem before the Board, therefore, involved not the resolution of credibility conflicts but rather the drawing of inferences from the facts on the record. See cases, pp. 14-15, *supra*. In this connection the following points must be made. As discussed above, the request for continued life insurance coverage was made initially by McNeil, president of Local 44, the representative of the production and maintenance employees, at the end of an all-night bargaining session. This particular session was solely between the Company and Local 44; McIntyre, of Local 412, representative of the

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[23] Moreover, where (as here) the Board dismissed the complaint, the significance of the Examiner's contrary ruling in upholding it must be evaluated in light of the fact that the General Counsel has the burden of affirmatively establishing by the preponderance of the evidence that a violation of the Act has been committed. *International Woodworkers v. N.L.R.B.*, 104 U.S. App. D.C. 344, 345, 262 F.2d 233, 234 (1958); *Falstaff Brewing Corp.*, 128 NLRB 294-295, n. 2 (1960), enf'd. as modified, 301 F.2d 216 (C.A. 8, 1962). Where the Board finds that an employer's conduct did not interfere with protected rights, the Board's determination will be upheld unless it has "no rational basis" (*International Woodworkers v. N.L.R.B.*, 105 U.S. App. D.C. 37, 39, 263 F.2d 483, 485 (1959); *Amalgamated Clothing Workers v. N.L.R.B.*, 124 U.S. App. D.C. 365, 378, 365 F.2d 898, 911 (1966)), or unless "the evidence required the Board to uphold the claim" that the statute was violated (*Amalgamated Clothing Workers v. N.L.R.B.*, 118 U.S. App. D.C. 191, 334 F.2d 581 (1964)) because the only inference reasonably to be drawn from the record is that respondent violated the Act. It is well settled that a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951); *International Woodworkers v. N.L.R.B.*, *supra*, 104 U.S. App. D.C. at 345, 262 F.2d at 234. Cf., *Fruit & Vegetable Packers and Warehousemen Local 760 v. N.L.R.B.*, 114 U.S. App. D.C. 388, 389-390, 316 F.2d 389, 390-391 (1963).

salaried employees, was present only as an observer. McIntyre's request for continuation of coverage was made immediately after, was directly related to, and therefore would most likely have been interpreted in terms of McNeil's. This is significant because McNeil's request of necessity included only the regular group life and health insurance; the production and maintenance employees whom he represented were not even eligible for coverage under the Security Trust Fund. Even more significantly, it was established at the hearing that the death benefit aspect of the Security Trust Fund was considered inseparable from the Plan itself which, as far as the Company was concerned, was essentially a pension rather than an insurance plan (A. 104, 109, 112, 209-210, 212-213). Discussion of life insurance, on the other hand, in Company terminology, referred only to the basic group policy under which all the employees were covered (A. 104, 109, 112, 209-210, 212-213). Therefore, even if McIntyre's request were made entirely separately from that of McNeil, it would be reasonable to conclude, as did the Board, that the Company did not understand the Security Trust Fund coverage to be included therein. Cf. *Booth Fisheries Corp. v. Coe*, 72 App. D.C. 195, 114 F.2d 462 (1940), cert. denied, 311 U.S. 691.

The Union, impliedly conceding the reasonable possibility of confusion, offers two somewhat inconsistent contentions to defend and explain its lack of specificity. On the one hand, it argues that the reason for the vagueness of its request was the fact that it lacked information concerning the Company's benefit plans; on the other, it maintains that subsequent discussion between Waters and Booth, in which the Security Trust Fund was specifically mentioned, cured the defects in the earlier request. The first contention is belied by the record evidence that the Union was not only aware of the separate existence of the Security Trust Fund and the death benefit provided therein (A. 30, 33-34, 102, 127, but see A. 125),

but also had in fact only recently bargained with the Company over the inclusion of the Plan in the collective bargaining agreement. Moreover, copies of booklets describing the Security Trust Fund Plan as well as copies of the insurance certificate itself which contained the relevant termination provisions were distributed to the salaried employees (A. 37, 19, 40, 109-111, *supra*, p. 4).[24] While copies of the master plan, which probably would have been unnecessary anyway for purposes of the request, were not distributed to the employees, such copies were presumably available to the Union or the employees upon request, the Board having found that no such request was made by the Union. See pp. 19-21, *infra*.

With respect to the Union's second contention, the April 30 conversation between Booth and Waters was of a different nature than and entirely unrelated to McIntyre's request earlier that morning and therefore cannot be asserted as clarification of that request as urged by the Union. At the April 30 conversation, Booth, who was not familiar with the arrangements made the night before between Williams and McIntyre, was merely seeking information concerning what arrangements had been made for continuation of insurance coverage during the strike (A. 125-126).[25] During the course of this conversation Booth specifically mentioned the Security Trust Fund coverage. Waters answered that he did not know what arrangements had been made, that he did not think the Security Trust Fund was included, but that he would try to find out. It is submitted that rather than demonstrating the Company's intention to mislead the Union, the evidence concerning this conversation shows just the opposite. For Waters' response to

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[24] Mention of the insurance certificate was conspicuously omitted from the Union's brief.

[25] Booth testified that McIntyre had informed him at a union meeting before the strike and before the April 29 negotiating session that "UAW would pick up the tab" for the insurance (A. 115-117).

Booth's inquiry put the Union on notice of at least the possibility that the Company did not understand the Union's request as including the Security Trust Fund; and, as pointed out by the Board (A. 430), the Union did not appear to be concerned enough to change that impression, thus confirming the Company's original interpretation of the request.[26]

This apparent acceptance of the Company's position is most clearly manifested by the Union's attitude toward the material forwarded to it by the Company in connection with the Company's billing of the Union for the premiums which were being paid. The fact that Security Trust Fund coverage was not being continued was made clear by both the invoices themselves and the individual "breakdown tab run" enclosed therewith. Thus, the invoices specified "Basic Group Life Insurance and Accidental Death and Dismemberment Coverage" and omitted any reference to the more exclusive and limited death benefit provided by the Security Trust Fund (A. 149, 152-153, 360, 368). Moreover, the amount of coverage for each employee was listed on the individual tab run (in thousands of dollars). Had these figures corresponded to the death benefit payable to each employee under the Security Trust Fund, which (as the Union knew, A. 34) amounted to twice the employee's annual salary, they would, of course, not have been uniform and presumably would have been higher than the amounts listed (see, *e.g.*, A. 132, 172). Instead, the figures corresponded to the face amount of the basic group policies, which, as the Union also knew, was six or seven thousand dollars for most employees, with some enjoying coverage as high as twelve thousand (A. 112, 127, 362-363). However, neither McIntyre, Booth, nor any other Union representative even bothered to check the bills to make sure that the Company was carrying

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[26] Further corroboration may be found through the June 1 conversation between the same two parties during which Waters informed Booth that he still could not confirm that Security Trust Fund coverage was being continued.

out their request as allegedly intended (A. 63-64, 68, 119, 121, 127, 150, 152-154); under these circumstances, the Union cannot excuse its inaction because of lack of knowledge. Cf. *Ives v. Sargent*, 119 U.S. 652, 661 (1887); *The LuLu*, 77 U.S. 192, 201 (1869). In view of the Union's acquiescence in the Company's conduct during the strike, following a request for continued coverage which at best could be characterized as vague, it is submitted that the Board properly declined to invoke the provisions of the Act to place responsibility on the Company for the financial loss of Racely's widow.[27]

Petitioner's final contention is that the Company independently violated Section 8(a)(5) of the Act by agreeing and then failing to supply the Union with copies of the master agreement underlying the Security Trust Fund.[28] However, the Union's theory is simply not supported by the

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[27] The death benefit insurance contract provides that certain employees who are not actually working (*e.g.*, those on leave of absence, disabled, temporarily laid off, or retired) may be considered as actively engaged in work on a full-time basis for purposes of continued coverage (A. 305, 313-314). As shown, the Board justifiably found that the Union here did not ask the Company for leave to pick up the premiums to keep the Security Trust Fund policy in effect for the strikers. Accordingly, we need not reach the question of whether this language would as a matter of law create or reinforce any duty by the Company to comply with such a request for strikers (cf. Union br., pp. 22, 24-25), nor whether the Union would be warranted in its contention (br., pp. 28, 19, n. 13) that such a refusal by the Company in view of this language would compel a finding that the Company acted with a punitive intent. Not having excepted to the Examiner's finding that there is no direct evidence of antiunion animus (A. 422) or an intent to restrain and coerce employees, petitioner may not challenge it here. *Dallas General Drivers, Local v. N.L.R.B.*, 128 U.S. App. D.C. 383, 385, 389 F.2d 553, 555 (1968). In any event, we find the Union's contention that the Company maliciously deprived the striking salaried employees of Security Trust Fund death benefit coverage difficult to reconcile with the undisputed evidence that the Company promptly complied with both Local 44's and the Union's request for such arrangements in connection with all strikers' insurance concededly covered by their requests (*supra*, pp. 6-7).

[28] The Union also contends that the Company violated Section 8(a)(5) by misleading it into believing that Security Trust insurance would be continued during the strike and by repudiating an agreement to continue it. These contentions are dependent upon the conclusion, properly rejected by the Board as discussed above, that the Company understood the Union's request as including the Security Trust Fund.

testimony believed by the Examiner, who credited the testimony of Company representatives that the Union had not requested a copy of the master plan, rather than the testimony of Union representatives that they made such requests in February and June 1967 (A. 423-424; 24-25, 99-100, 108, 135-137, 138-139, 143, 154, 163-164, 175-177, 179, 186). Although elsewhere paying great deference to the Examiner's special competence with respect to credibility findings, the Union attacks the Board's acceptance of this one (Br., pp. 6, n. 6, 27).[29] The Union asserts (br., pp. 6, n. 6, 27) that the Examiner failed to notice McIntyre's explanation of the apparent contradiction between his testimony that he requested the information in June 1967 and his admitted failure to file a charge until July 1968 (A. 24-26, 46), an explanation allegedly provided by his testimony on redirect that the Company had agreed to provide the information but never did (A. 70-71). This testimony, however, is not essentially different from that expressly adverted to by the Examiner – namely, that the Company "hadn't refused" (A. 424; 26, 46) to provide the information in June 1967. The Examiner might well have believed that if a request had really been made, the charges would not have been delayed for more than a year thereafter

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[29] Contrary to the implication in the Union's brief (pp. 17, 33, n. 20) no impropriety may be found in the fact that the Board did not specifically deal with the Union's exception to this finding. *Division 1142, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO v. N.L.R.B.*, 111 U.S. App. D.C. 68, 72, 294 F.2d 264, 268 (1961); *N.L.R.B. v. Process Corp.*, 412 F.2d 215, 217 (C.A. 7, 1969), and cases cited.

even if the Company had merely failed rather than refused to comply with the request.[30]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition to review should be denied.

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September 1970.

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30 The Examiner and the Board having found that the Union had never asked for a copy of the plan, they had no occasion to consider whether the 6-month statute of limitations imposed by Section 10(b) of the Act would bar an unfair labor practice finding based upon the Company's failure to supply it, since the latest alleged request was made in June 1967 and the first charge was filed in July 1968. See *Local Lodge No. 1424 v. N.L.R.B.*, 362 U.S. 411 (1960); *American Federation of Grain Millers v. N.L.R.B.*, 197 F.2d 451, 454 (C.A. 5, 1952); *N.L.R.B. v. Electric Furnace Co.*, 327 F.2d 373, 376 (C.A. 6, 1964); *International Union United Auto Workers v. N.L.R.B.*, 124 U.S. App. D.C. 215, 219-220, 363 F.2d 702, 706-707 (1966), cert. denied, 385 U.S. 973; *Local U. No. 167, Progressive Mine Workers v. N.L.R.B.*, 422 F.2d 538, 542-543 (C.A. 7, 1970), cert. denied, 399 U.S. 905.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED STATES SMELTING, REFINING AND MINING CO., AND ITS WHOLLY-OWNED SUBSIDIARY, MUELLER BRASS CO.,

Intervenor.

No. 23,978

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR INTERVENOR

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AUTHORITIES CITED

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No. 23,978

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR INTERVENOR

COUNTERSTATEMENT OF ISSUE PRESENTED

Whether the Board's dismissal of the Complaint alleging Company violations of Sections 8(a) (1), (3) and (5) of the Act by failing to comply with the Union's alleged request for Security Trust Fund coverage during the

strike and by failing to supply information allegedly requested by the Union is supported by substantial evidence on the record considered as a whole. Intervenor contends the Board's dismissal is supported by the great weight of the evidence.

This case is before the Court for the first time.

COUNTERSTATEMENT OF THE CASE

Intervenor[1] accepts and adopts by reference the counterstatement of the case set forth in the Board's brief.

ARGUMENT

THE BOARD'S DISMISSAL OF THE COMPLAINT ALLEGING COMPANY VIOLATIONS OF SECTIONS 8(a)(1), (3) and (5) OF THE ACT BY FAILING TO COMPLY WITH THE UNION'S ALLEGED REQUEST FOR SECURITY TRUST FUND COVERAGE DURING THE STRIKE AND BY FAILING TO SUPPLY INFORMATION ALLEGEDLY REQUESTED BY THE UNION IS SUPPORTED BY THE GREAT WEIGHT OF THE EVIDENCE ON THE WHOLE RECORD.

I. Introduction

Before proceeding to evaluate the Union's various claims of Company failures and refusals, we think it well to point out some basic facts. First, the Union really did nothing significant to obtain the death benefit coverage

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[1] Mueller Brass Co. is referred to as "the Company" herein. Appendix references are designated "A". Those preceding a semicolon are to the Board's and/or the Trial Examiner's decision; those following to the evidence.

before Racely died. The Company agreed to carry on certain coverages and billed the Union therefor. The Union paid the Company billings clearly excluding the death benefit coverage. Its chief representative and negotiator, after making his initial informal request, never thereafter spoke to anyone as to any dissatisfaction with the Company's handling of strike coverages. *What the Company did* was to cooperate by preparing precise billings and tab runs for various coverages in varying amounts, listing individual employee data, and clearly excluding the Security Trust and its death benefit. Then, after the fact, after Racely's death, the Union leveled its barrage of charges alleging a failure and refusal to cooperate with the Union and a failure to supply information some one and one-half years previously. All of this, quite obviously, done because of the lapse of Racely's death benefit, the blame for which the Union sought to place on the Company.

The record amply reveals *the real failure in this case* — that of the Union to adequately represent its members. There were so many things the Union *could have done before Racely died* — but did not do. The Board considered the whole record — witnesses of both the Union and the Company, as well as documentary evidence, and concluded that this was so. The Examiner, however, had looked at the same record and made the ultimate factual finding that what the Union did nevertheless was sufficient to constitute an adequate request. Finding this, he went on to hold as a matter of law that, since in his view the Company had failed to cooperate, the same constituted violation of the National Labor Relations Act.

The Examiner's opinion contains a real minimum of credibility findings. The Board's decision does not refer to credibility at all, nor does its reversal of the Examiner's

ultimate factual conclusions require the discrediting of any testimony believed by the Examiner. Anything the Union witnesses said is consistent with the Board's conclusion that the Union did not adequately make known its desires with respect to the Security Trust Fund — if in fact it desired such coverage as it now claims. The Union's cry of credibility reversals is simply the oft-heard objection of the litigant who does not want to accept the fact-finder's inferences and conclusions, i.e., those of the Board. Every difference of opinion is claimed to be a rejection of credited evidence or undisputed evidence.

II. Standards of Review

A. General Principles

The basic standard governing this Court's review of this case is, of course, the substantial evidence rule.[2] As reaffirmed in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 478 (1951), substantial evidence "is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." The Supreme Court noted that the Board's expertise within its field of knowledge was entitled to respect by a reviewing court and that even as to matters not involving such expertise, the court was not at liberty to choose between two fairly conflicting views, as it would be upon a review of the case *de novo.* 340 U.S. at 488

The Court does not substitute its inferences for those of the Board. *International Woodworkers* v. *NLRB,* 104 App.

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[2] Section 10(f) of the Act, 29 USC § 160 (f), provides in part:

> "[T]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

To like effect, see the Administrative Procedure Act, 5 USC § 706 (2) (E).

D.C. 344, 345, 262 F. 2d 233, 234 (1958). And where, as in the instant case, the Board has not found a violation of the Act, the Board's decision must be upheld unless the reviewing court can find no rational basis for it. *International Woodworkers* v. *NLRB*, 105 App. D.C. 37, 39, 263 F. 2d 483, 485 (1959); *Amalgamated Clothing Workers* v. *NLRB*, 124 App. D.C. 365, 378, 365 F. 2d 898, 911 (1966).[3]

And in a case such as the instant one, where the Board and its examiner have disagreed, the examiner's decision is to be viewed as a part of the whole record, and to be given such weight as it reasonably deserves. *Universal Camera Corp., supra* at 493-96.[4]

In *Local 1175, Sign & Pictorial Union* v. *NLRB*, ... App. D. C....., 419 F. 2d 726 (1969), this Court denied a union's petition for review where the Board, contrary to its trial examiner, had dismissed a complaint alleging bad faith bargaining on the part of the company. The Court's discussion of applicable review standards and the union's claim of improper credibility reversals is pertinent to the present case. The Court stated:

> "At the outset we dispose of the Union's contention that there is some special significance in the fact that the trial examiner reached one conclusion regarding post-strike negotiations and conduct while the Board reached another. The Union argues first

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[3] A finding of a violation of the Act by the Board must be based on the preponderance of the evidence. 29 USC § 160 (c). Under 5 USC § 556(d) (Administrative Procedure Act) the proponent of an order has the burden of proof.

[4] USC § 557(b) (Administrative Procedure Act) provides that upon appeal from a trial examiner's decision, the agency has all the powers it would have had in making the initial decision. Thus it reviews the record *de novo*.

that the Board erred in failing to accord proper weight to the trial examiner's credibility resolutions. Secondly, it contends that since there was substantial evidence in the record to support the trial examiner's findings and conclusions of law, the Board should be directed to enter an order consistent with the trial examiner's recommended order. But the Union in urging this second contention misapprehends the law. While the Court must sustain the Board's determination if upon the entire record it is supported by substantial evidence, 29 U.S.C. Sec. 160(f) (1964); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, . . . (1951), the relationship between the Board and its examiner is quite different. The question 'is not whether there is substantial evidence to support the trial examiner's findings . . . but the legal adequacy of the Board's decision which differs from his.' *Retail Store Empoyees, Local 400* v. *NLRB*, 123 U.S. App. D.C. 360, 361, 360 F. 2d 494, 495 (1965). Since the Board is the agency entrusted by Congress with the responsibility for making findings under the statute, 'it is not precluded from reaching a result contrary to that of the Examiner when there is substantial evidence in support of each result.' *Oil Chemical & Atomic Workers, Local 4-243* v. *NLRB*, 124 U.S. App. D.C. 113, 115-116, 362 F. 2d 943, 945-946 (1966). 'This is not to say that the contrary conclusion drawn by the trial examiner was itself unreasonable. Often a set of facts will supply substantial evidence for either of two conflicting conclusions. In such instances, Congress has decided that the Board's inference shall control,' *International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *NLRB*, 135 U.S. App. D.C. 355, at 358, 418 F. 2d 1191, at 1194 (July 22, 1969) . . .

"As for the Union's argument that special deference was owed by the Board to its examiner's credibility determinations we do not agree that the

different results reached by the examiner and the Board turned significantly on findings as to credibility. Rather the Board drew different inferences and conclusions than did the examiner from the established facts." 419 F2d at 733-34.

B. Board Reversal of Credibility Findings

At Page 12 of the Union's brief it is asserted that unless the evidence credited by a trial examiner "carries its own death wound" or the discredited evidence is "irrefutably true," the Board is *without power* to overrule the credibility resolutions. The brief states:

> "We show below that there was no evidence so compelling as would justify the Board's over-ruling the credibility resolutions herein. *The rejected evidence was not 'irrefutably true', the credited evidence did not 'carry its own death wound'.*" (emphasis added)

The above assertion by the Union is particularly significant because its entire appeal is bottomed thereon. No such limitations on the Board's powers exist.

NLRB v. *Pittsburg S.S. Co.*, 337 U.S. 656 (1949) is quoted as supporting the above proposition, as follows:

> "A Trial Examiner's credibility resolutions are to stand, unless the credited evidence 'carries its own death wound' or the discredited evidence is irrefutably true."

The Supreme Court's quote of the above passage was from *NLRB* v. *Robbins Tire & Rubber Co.*, 161 F. 2d 798, 800 (5th Cir. 1947). *In neither of these cases was the respective court dealing with a Board reversal of a trial examiner's credibility resolutions.* Rather, the trial examiner and the Board, in both cases, had concurred in consistently crediting

Union over Company witnesses in finding the Companies in violation of the Act. The decisions were appealed on the issue of trial examiner *bias*. The Courts stated a very limited reviewing function in the *Court's* review of the trial examiner's credibility resolutions.

In *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950) (also cited at page 12 of the Union's brief), it is correct that the Board in its opinion did indicate its reliance upon trial examiner credibility resolutions insofar as they are based upon demeanor. The Board said it would not reverse the same unless a clear preponderance of the evidence showed them to be incorrect. 91 NLRB at 545.

It is instructive to contrast the present case with *Standard Dry Wall*. In that case the basic issue on appeal was the Examiner's consistent crediting of two union witnesses and discrediting of two company witnesses. The Examiner specifically referred to demeanor (91 NLRB 553, N. 10) of reconciliation testimony was extensive and not capable of reconciliation. The Board noted the Examiner's demeanor findings (91 NLRB at 544). The violations concerned repeated conscious harassment of union members.

In the instant case the Examiner referred to credibility but once—in finding that Waters had told Booth on May 1 that he would call him back. (A. 422) Nowhere else in his opinion does he discredit Company witnesses. In fact, he specifically credits the testimony of Company witnesses over that of Union witnesses as to the alleged requests for information during 1967-68 contract negotiations. (A. 424)

III. The Company Did Not Fail Or Refuse To Supply Copies of The Security Trust Plan Or Insurance Policies Thereunder During the 1967 Negotiations With Local 412.

A. Examiner and Board Findings

At page 5 of its brief the Union again alleges requests by Union negotiators in February and June of 1967 for a copy of the Security Trust Plan. The same argument is repeated at page 26. The Complaint, pars. 18(a) and (b), alleges requests by the Union for copies of the Plan *and* insurance contracts thereunder. Why this latter aspect is dropped by the Union on this appeal is not stated. The evidence cited at pages 5, 6, 16, and 27 is of course *only* the testimony of *Union* witnesses, to the effect that the requests were made. Additionally, the Union curiously asserts that the Examiner must have relied only on *part* of McIntyre's testimony—that at A. 46, wherein he said the Company "hadn't refused" him the information. It is contended that because McIntyre also said "they agreed to give it to me. but just never did," the Examiner was in error in dismissing this aspect of the case. (Brief, p. 6, n. 5 and p. 27)

Aside from presumption as to what the Examiner read or heard in testimony—it is obvious he did not *base* his opinion simply on McIntyre's one answer. At A. 423-24, the Examiner notes (1) that the parties in 1967 bargained fully to agreement on the Plan and no evidence in the record indicates any real desire on the part of the Union to see the Plan, and (2) that Company representatives denied receiving the requests. He said: "They were probably correct in their recollections." Thus, the Examiner noted McIntyre's testimony regarding his two alleged requests and specifically *discredited it*. The Board in not discussing the point, affirmed this finding by the Examiner. (A. 429) The Union's citation of *IUE* v. *NLRB (Tiidee Products)* (D.C. Cir., Nos. 22797 and 22911, April 3, 1970), at pages 17 and 27 of its brief, is entirely misplaced. There the Court was dealing with the adequacy of the Board's affirmative relief. The Board's sub silentio affirmance is entirely

proper. See *Amalgamated Association of Street Electric Railway and Motor Coach Employees of America, AFL-CIO* v. *NLRB*. 111 App. D.C. 68, 72, 294 F 2d 264, 268 (1961).

B. Union's Reliance On Alleged Failure to Supply Information to Support Remainder of Case.

We wish to point out how completely the Union relies on its claim of thwarted information requests. It does so in order to excuse its inaction a year or so later, by claiming that the Company somehow kept the Union ignorant or "in the dark" about what benefits were contained in the Plan. This ignorance or confusion is cited extensively to excuse the later inactions and failures by the Union.[5] This proposition would seem to be an admission that if the Company did *not* refuse or fail to supply the information, then the *UAW* is to be held responsible for its own ignorance. By the Union's own logic, they are responsible, therefore, for not clarifying their request—not the Company. Certainly we may ask at this point: if need for the Plan was so crucial in order to understand the insurances—why then no requests after June of 1967, no requests in preparation for or during the strike?

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[5] At p. 14 it is stated: "At no time were any employees shown the master insurance policy or the actual Security Trust Plan Agreement . . ." At p. 16, "They could rely only on the employee booklet for information as the Company, despite repeated requests to do so, had failed to supply the Union with a copy of the Plan or of the Master Policy . . . no basis in the record to infer Union knowledge of the workings of the Plan . . . to be more specific in its request, especially here, where the lack of Union knowledge results from the Company's failure to live up to its bargaining obligation." At p. 26, "The facts demonstrate that the Employer completely disregarded the Union's request for a copy of the Security Trust Plan." At p. 27, "[T]he Union did request a copy of the Plan . . ." Finally at p. 34 it is stated: "Further, since the Company never supplied the UAW with a copy of the Plan and never explained the Plan to UAW negotiators, it is understandable that McIntyre and Booth were both unsure as to whether there was one policy or two, or as to exactly how the Security Trust Plan operated."

In this regard we note the Union's heavy reliance on the pension plan booklet. Throughout its brief it claims this to be the only information given to the employees, and that the Company is somehow bound and tied to the letter of the booklet. Again, this is supposed to flow from the Company's supposed refusal to give any other information. Since the latter contention is not supported, we submit that the provisions of the Plan and its Prudential death benefit policy are completely admissible for consideration on this appeal. The Union accepted in bargaining the Security Trust Plan. Its belated reliance on the literal word of the booklet is indeed curious. Its chief negotiator, Alex McIntyre, testified he had never read or studied the booklet! (A. 41)

Finally, as to the Union's allegation at p. 27 of its brief that the Company kept the Plan "tightly within its own hands," this is of course based on the same presumption of a Company failure that the Examiner and Board did not find. And the allegation on p. 28 thereof of the Company's *misleading* the Union during the strike is equally made up of whole cloth and surmise. Similarly, on the same page appears the picture of the Company finally being forced to tell someone about the Plan—the Trial Examiner. The attorney prosecuting the case as well as the UAW attorney had copies of the Plan, but neither had explained what the case was about to the Examiner. Counsel for the Company finally did. See A. 81-83; 111-17.

C. Evidence Supporting Examiner's and Board's Finding of No Company Failure or Refusal to Supply Information.

1. Company Witnesses

In contrast to the vague and uncertain testimony of McIntyre and Booth (A. 24-26, 98-100, 107-111 and 114-15), not

substantiated by any written notes, and not corroborated by any others of the Union negotiators (who did not testify at all), all three Company negotiators testified to having no recollection of any such requests having been made and all three were able to testify that no notation of any such requests appeared in their notes covering all of these negotiating sessions. (A. 134-42, 163-64, 170, 176-77, 179) However, Company witnesses did recall a request made by Mr. McIntyre at the first session for an employee booklet outlining a new Health and Accident insurance plan which U.S. Smelting, the parent Company, had recently inaugurated for salaried employees (A. 136-37, 170, 177); this booklet was given to the Union at the next negotiating session, along with an oral explanation of the plan by Mr. Williams. (A. 137, 170, 177) Mr. McIntyre testified that he *could not remember* whether or not he had requested this pamphlet, but on cross-examination stated "I probably did [request them], but I just can't simply put my finger on it." (A. 54) However, he had no trouble remembering that at this same meeting he requested the Security Trust Plan and the insurance policies thereunder.

2. Failure to Complain or Object

And it is undisputed that at no time did the Union complain about or object to the asserted refusal by the Company to supply it information. Nor did it file timely charges based on the now asserted refusal. Suffice it to say that had there in reality been a genuine desire for these items, they would have been supplied. The weakness of the efforts to obtain them, if any efforts there were, belies the allegation a year later of refusal or failure. Mr. McIntyre's explanation for the absence of objection was, "They hadn't refused." (A. 26)

3. Lack of Interest in Available Booklet

Mr. McIntyre testified that his February 27, 1967 request was for the Security Trust Plan itself—he didn't want a copy of the booklet, which he knew had been given to the employees "as is quite usual." (A. 37) The probability of this alleged request should be judged against Mr. McIntyre's admitted total ignorance of this booklet he did not want to see. He solemnly testified that *he* did *not* have a copy of the booklet. But he had *seen* it. (A. 40) Did he have access to it from his own negotiators? "One of the employees had a copy." (A. 40) Had he looked at it? "No, I had seen the pamphlet. I hadn't studied the pamphlet." (A. 40-41) He didn't recall looking at or reading the pamphlet? "That's correct." (A. 41) Finally, he agreed that he didn't "know anything about the Security Trust Plan, or . . . just a couple of things [and wasn't] informed about the Security Trust Plan." (A. 41) He apparently wasn't concerned enough about the Security Trust Plan to bother reading the summary of the Plan, at all times readily available to him. Yet we now hear that he was anxious to get copies of the Plan itself *and* the master insurance policies thereunder. Are we to suppose he would have studied them? We have Mr. McIntyre's own testimony that although the Company did supply the Security Trust Plan and master insurance policies to the Union after Racely's death, "Personally, I have not received a copy as of yet from the Company." (A. 24)

We note also that although it was his "standard procedure" to request master insurance policies in negotiations (A. 51), he did *not* request the master policies of the Company's Health and Accident and Hospital-Medical insurances. He claimed to have requested the master policy of the regular group life insurance, but couldn't remember of

whom or when. (A. 52)

4. Negotiations on Security Trust Plan

Finally, there is the evidence relating to the curious fact that although the Union was supposedly ignorant about benefits under the Security Trust Plan, it negotiated to final agreement on the Plan and its death benefit. As noted above, Mr. McIntyre "didn't know anything about the Security Trust Plan, or . . . just knew a couple of things . . . and [wasn't] informed about the Security Trust Plan." (A. 41) He said that during 1967, "We did no negotiations—had no negotiations on the Security Trust Plan." However, "We were informed of things that were in the Security Trust Plan. We had a general idea of the Security Trust Plan." (A. 40) Mr. Booth testified that: *"I know we discussed the Security Trust Plan many times during that session of meetings in that six-to-eight Month period."* (A. 100) (emphasis added) And Mr. Williams affirmed that during this period, "We talked about it back and forth, various items on it." (A. 180)

Respondent's Exhibits 1-3 and 10-14 (A. 332-49, 373-409) show a series of offers and counteroffers between the Company and the Union, beginning with the May 8, 1967 *Union* proposal to the Company and ending with the parties' July 21, 1968 settlement agreement. It is obvious from these documents and the testimony of Mr. McIntyre and Mr. Williams that in June or July of 1967 agreement had been reached on a pension plan that continued the plan already in effect for salaried employees—i.e., noncontributory retirement income pension plan with optional Security Trust Plan coverage at employee's voluntary election.

This conclusion is graphically supported by noting the language of some of these proposals. For instance, the May 8, 1967 *Union Proposal* (A. 334) urged that:

> "All employees of the Unit who otherwise meet the requirements of the 'Security Trust Plan' shall at their option on a voluntary basis be eligible to participate in the 'Security Trust Plan'."

The Company's June 27 proposal (A. 344) repeated this same language in a pension plan program somewhat different from the Union's May 8 offer. The *Union* replied on July 13 that:

> "The Pension Plan, as presented to us in writing *and as we accepted on June 27th, is acceptable.*" (A. 349) (emphasis added)

This agreement as to the Security Trust Plan was carried over into two Company July, 1967 proposals. (A. 373-88) The July 28 proposal incorporated four letters of same date to Mr. McIntyre, confirming certain verbal assurances that had been made. One related to pensions and stated:

> "During the life of the Agreement between Mueller Brass Co. and Unit 12, Local 412 . . . if the Company makes any changes in the existing pension plan for other non-exempt salaried employees, it will make such changes for the employees covered by this agreement." (A. 388)

The same agreement was extended by the Company's April 27, 1968 offer (A. 391) and its June 27, 1968 offer (A. 397) finally incorporated into the parties' July 21, 1968 Settlement Agreement. (A. 405) Page 5 thereof states: "The pension is to be the same as proposed on June 27, 1967." (A. 407)

5. Acquiescence and Abandonment of Alleged Request

During this whole course of negotiations nothing was heard of any lack of information on the Union's part, and we can hardly be asked to believe they were ignorant of what they were proposing, accepting and agreeing to. In

any event, after reaching agreement on pensions it is clear there was no need or request for any master plans or policies relating to the Security Trust Plan. Accordingly, any earlier requests, were there any, were clearly abandoned. See, e.g., *NLRB* v. *Movie Star, Inc.*, 361 F. 2d 346 (5th Cir. 1966); *Westinghouse Electric Corp.*, 129 NLRB No. 98 (1960); *McCullogh Corp.*, 132 NLRB No. 24 (1961).

D. Section 10(b) Six Month Limitation[6]

The alleged requests for information are said to have occurred in February and June of 1967, some seventeen and thirteen months prior to the filing of the charge in July, 1968 [Complaint par. 18(b)]. Failure to supply the information is claimed to have contributed to the lapse of Racely's insurance by causing ignorance on the part of the Union. Thus the asserted refusals to supply information are not mere "background evidence" and as such not covered by Section 10(b). Rather, as stated in *Local Lodge 1424* v. *NLRB*, 362 U.S. 411, 417 (1960):

> "[T]he use of the earlier unfair labor practice is not merely 'evidentiary,' since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful."

See *NLRB* v. *MacMillan Ring-Free Oil Co.*, 394 F. 2d 26 (9th Cir. 1968); *Breckenridge Gasoline Co.*, 127 NLRB No. 176 (1960).

Nor is the "continuing violation" theory applicable. In

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[6] Section 10(b), 29 USC 160(b), provides, in part:

> "Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge . . ."

NLRB v. *Electric Furnace Co.*, 327 F. 2d 373 (6th Cir. 1964) the Union had unquestionably requested copies of the Pension Plan and Trust Agreement. The Company clearly had *refused* to supply the information. The Court stated:

> "The Company's refusal to furnish the requested information occurred on September 8. To hold that this act continues indefinitely in the absence of further request by the Union and under the circumstances here involved would do violence to Sec. 10(b) and would render this provision of the Act virtually impotent. Local Lodge No. 1424, International Association of Machinists v. NLRB, 362 U.S. 411; NLRB v. Lundy Mfg. Corp., 286 F.2d 424 (CA 2); Federation of Grain Millers v. NLRB, 197 F.2d 451 (CA 5)." 327 F.2d at 376.

The decision in *Electric Furnace* is based upon *NLRB* v. *Columbian*, 306 U.S. 292, 297-99 (1939), holding that the duty to bargain arises upon request, and *Grain Millers* v. *NLRB*, 197 F. 2d 451 (5th Cir. 1952), wherein the Court agreed with the Board that there was no continuing obligation to bargain "which, without request, renewed itself each day after the first refusal . . ." 197 F. 2d at 454.

IV. The Company Did Not Fail or Refuse to Continue Security Trust Plan Coverage For Local 412 Employees During The Strike In Violation of Sections 8(a)(1), (3) or (5) of the Act.

A. Introduction

The above argument necessarily encompasses a reply to the Union brief, pages 12 to 36. Under various headings, the ultimate factual question of a sufficient request and refusal thereof is treated. It is asserted that the Company consciously "misled" the Union. See pages 28 to 34. And, as also noted above, great and strained reliance is placed

on the Company employee booklet.[7]

B. Documentary Evidence Re Security Trust Plan

It is well to point out at this juncture some of the language of that booklet as well as of other documentary evidence. First, the Union asserts that the booklet itself did

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[7] We have pointed out in note 5, supra, the Union's repetitious reliance on alleged Company-caused ignorance of the Security Trust Plan. We here note how the picture is painted that the Union was *forced to rely* on the Company booklet as its only information about the Plan. We have already noted the Chief Negotiator's ignorance even of the contents of the booklet, and the negotiations on the Plan during which time the included benefits were discussed at various times and final agreement reached.

On pages 3, 4, 5, 13, 14, 17, 18, 19, 21 and n. 14, 25, the booklet is either referred to or quoted to the effect that the death benefit would be paid in the event of death to *retirement*, that it was sometimes described as *proceeds of life insurance*, that it was covered by a *group insurance policy*, and that eligibility was not specifically made contingent on "active employment." In fact, *at page 14 the Union admits* that: "The uncontradicted documentary evidence demonstrates beyond cavil that the unit employees were covered by a group life insurance policy over and above the group life insurance policy covering all employees. *The employees were told by the employer-supplied booklet that a group life insurance plan was part of the Security Trust Plan.*" This admission would seem to rather weaken the Union's other claims of confusion or ignorance as to whether there was a separate policy of insurance covering the death benefit.

But the Union persists in maintaining ignorance to the fact there were two policies. For example on pages 18-19 it contends the designation "Basic Group Life Insurance" on the Company's billings, coupled with the information contained in the booklet, befuddled Booth into not knowing what the billings covered. But, as we show below, Booth knew only the "other"—regular—life insurance was being continued by the billing, he knew the amounts covered by each type of insurance and could have discovered easily that only the basic insurance was on the bill and tab run, and he never bothered to look at the billings anyway! Finally, at page 25, the Union asserts:

> "In any event the Company cannot rely on the language of the insurance policy since its booklet states otherwise and the Company must be held responsible for its own words and deeds."

Cone Bros. Contracting Co., 158 NLRB 186 (1966) is cited in support thereof, but examination reveals its irrelevance to the issue.

not make the death benefit coverage dependent on "active employment." See brief pages 4, 5.

However, most of the items in the description of the Plan contained in the booklet, when speaking of receiving benefits "before retirement," for example, mean, obviously—*and before an employee terminates employment* for purposes of the Plan. In fact, on page 3 (A. 318) it is stated: "You will, under certain conditions, be eligible for benefits if you terminate employment before normal retirement." Also, contributions to the Plan are stated to be required until 35 years contribution, "your retirement, termination or death . . ." (A. 321) And Answer 11 states (A. 321-22):

> "If the Group Life Insurance of a member ceases because of retirement or termination of employment, the participant has the right to apply . . . for an individual policy . . . This right must be exercised within 31 days after the date of termination of employment."[8]

Besides the booklet, all employees eligible for the Security Trust Plan were given a Prudential insurance certificate covering the death benefit aspect of the Plan. (A. 19, 110-11) This certificate identified the amount of insurance as 24 times the employee's monthly earnings. (A. 311) Under "TERMINATION OF INSURANCE" it is provided that the insurance will automatically terminate if employment terminates as therein defined. Termination is "deemed to occur when an Employee ceases to be actively engaged in

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[8] Page 10 of the booklet states:

"This booklet is intended only as an outline of the Plan and not as a complete description.

"In the event of any inconsistency between this booklet and the Plan, the actual provisions of the Plan shall govern." (A. 325)

work on a full-time basis . . ." (A. 313)[9]

Under the provisions of the Security Trust Plan itself a member whose employment terminates is entitled to a refund of all of his own contributions plus interest at 2½%. (A. 275)

Contributions to the Plan are stated in the booklet and in the Plan to be: 3% of first $400 of monthly income and 4% of the excess. (A. 274, 321) The Plan does not specify what part of the Plan the employee contribution goes to.[10]

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[9] The conversion feature is defined nearly exactly as it is in the Security Trust booklet. (A. 314) These termination and conversion provisions are essentially identical to those contained in the Prudential policy itself. See A. 305. It is also provided therein that the insurance will terminate if the employee "fails to make, when due, any required contribution." (A. 305) And of course, the lapse of the Racely insurance occurred precisely because payments had not been made; the whole dispute in this case is over whose fault this is, no matter how much the Union may attempt to obscure this central issue by quoting language to this effect or that.

[10] The Union relies heavily on No. 5 in the list of benefits on page 3 of the booklet (A. 318) to support its statement, at page 3 of its brief, that the Company contribution only supports the retirement aspect of the Plan. However, a fair reading of the booklet indicates that the death benefit is *in lieu* of the retirement benefit and that the Plan is all one unit, including disability benefits. In the normal course of events it is basically retirement that the employee is interested in, and the explanation under No. 5 can just as easily be construed to mean the Company picks up the balance of the cost of the entire Plan in all its facets. The Examiner, of course, found that the Employee contributions are for both aspects of the Plan. (A. 412-13)

The Union repeats its erroneous assertion at page 20, n. 14. In addition, it misconceives what the Prudential Policy states as to employee contributions. The Prudential policy *limits employee contributions* to $.60 per month per $1000 of insurance coverage. (A. 304) The schedule of premium rates indicates that the *premium charge* for employees varies, depending upon age, from approximately $.27 per month per $1000 of insurance at age 30 to about $3.78 per month per $1000 of insurance at age 65. Thus necessarily, a large part of the premium for many employees would have to be born by the employer. It should be pointed out, also, that the Union's reference, on page 3, to the testimony of Williams (A. 207) as supporting its assertion that the Company share only supports the pension aspect, is completely erroneous. Williams testified, to the contrary, that as a matter of mechanics, the Company sends the employee contributions to the pension carrier, not the death benefit carrier.

We have pointed out in this section and the notes thereto these technical provisions and certain erroneous assertions by the Union with reference thereto not because we believe this case basically concerns these matters, but rather, to set the record straight.

The fact of the matter is the Company stopped making payments to the insurance company for the striking employees. As to certain policies it understood the Union to have requested a billing on, it cooperated and kept the coverages in effect by making the payments. No payments having been made for Racely's coverage, it lapsed. The issue is whether the Union clearly had requested the Company to allow it to make the premium payments so as to avoid this lapse. There is no real dispute over whether the insurance did lapse.

C. McIntyre's Request

The Board's finding that McIntyre's communication to Williams was unclear because of the lack of specific reference to the Security Trust Plan (A. 429-30) is said to constitute a rejection of credited and uncontradicted evidence.[11] In addition it is asserted, apparently to excuse McIntyre's failure to refer to the Security Trust Plan, that McIntyre *didn't know* the death benefit was covered by a separate policy of insurance. See Union brief pages 7 and 34. This alleged ignorance is, as discussed previously, claimed to have been caused by the Company. Other claims are made regarding the request. At page 16 it is erroneously asserted that "Williams knew that McIntyre wanted continued coverage under the group life insurance *programs.*" The word "programs" in the plural of course nowhere appears in any testimony. This is of course the

[11] See, e.g., Union brief p. 14, 16, 19, 28, n. 18.

same argument that the mere mention in some fashion or other of "life insurance" was necessarily understood by both McIntyre and Williams to include the Security Trust Plan death benefit. But this conclusion, of course, rests upon *many inferences* involving the parties' intentions, knowledge and other actions and inactions, including the setting wherein the request was made.

And other inferences are asserted to irrefutably rest on McIntyre's language. At page 22, note 15, it is asserted that the Company consciously and designedly responded to the Union's request to lull it into thinking the death benefit was being continued. The Company is said to have cleverly billed the Union for something different than agreed to. This "tactic" is said to show the Company's "unwillingness to even reveal its position to the Union." All of this quite simply rests upon the Union's *surmise* of certain subjective states of mind. The Board found that the billings weren't calculated to deceive anyone—"The Security Trust clearly was not included." (A. 430)

McIntyre was the chief UAW negotiator for Local 412. (A. 21-2) He had attended numerous bargaining sessions throughout the early months of 1967, at which sessions the benefits under the Trust Plan were discussed. (A. 100, 180) He knew the Plan included a separate death benefit in addition to the regular employee group life insurance. (A. 30, 34) He even knew the approximate amount of coverage per employee. He had access at all times here pertinent to the employee booklet and the Prudential insurance rider covering the death benefit. (A. 40, 111) (However, he was not interested or concerned enough to read these items.) He had not, as found by the Examiner and Board, made any real attempt at *any* time to see either the Trust

Plan Agreement or insurance policies thereunder. (A. 424, 429) And as testified to by Mr. Booth, McIntyre had informed the membership that the UAW would pick up the premiums for the "other" life insurance, that not connected with the Security Trust. (A. 102)

Furthermore, rather than following through his oral request with a specific confirming letter or inquiries concerning coverages and benefits, he simply called in on the telephone to the UAW Strike Insurance Department with the following message: "Mueller Brass Company had agreed to carry on the insurance coverages, and they would bill the UAW for them." (A. 62) He did not specify what coverages were continued or otherwise provide the Strike Insurance Department with any means of knowing what insurances were involved, which were being carried on and which were being allowed to lapse. (A. 63-64)

In any event, neither Mr. McIntyre nor the UAW Strike Insurance Department made any attempt whatsoever to determine these matters and to take appropriate steps to insure that coverages during the strike were being carried on. This is surely questionable conduct in view of Mr. McIntyre's experience with strike situations. (A. 58-9) In this connection, he did not review the Company's billings to the Union for the coverages which were continued, nor did he know of anyone at the UAW who did. (A. 63) The Company's billings, of course, listed each and every coverage continued by the Union, including the amount of life insurance for each employee. (A. 359-63, 67-68) *The only thing Mr. McIntyre did during the whole period of the strike* prior to Mr. Racely's passing was call Mr. Booth sometime in June to see if the bill from the Company had been reviewed by Mr. Booth and sent to the UAW. He and

Mr. Booth did not even discuss what was covered in the billings—yet the Security Trust Plan and its death benefits were clearly excluded. (A. 63-64) The incredible nature of this evidence points up again the simple fact that the Union's sudden concern for the Security Trust Plan bloomed sometime after June 22, 1968, the date of Mr. Racely's passing.

D. Booth Inquiry

The Union asserts that Booth was confused as to whether there was a separate death benefit insurance and as to whether the Company was carrying this on pursuant to the McIntyre-Williams agreement. It relies, as noted previously, on alleged Company-induced ignorance and on the assertion that the only information Booth had was in the booklet. However, as noted above, Booth had the Prudential insurance certificate covering the death benefit. (A. 110) He had been present at the numerous negotiations wherein the Trust Plan benefits were bargained upon and agreed to. (A. 124)[12]

Mr. Booth "was aware that the Union was making premium payments on the other [non-security trust] group life insurance and the group medical insurance." (A. 125-26) He had been told by McIntyre the UAW would pick up the "other life insurance." (A. 102) He was also aware that the basic group life insurance and the Trust Plan death benefit were "two separate insurances." (A. 127) He always thought of the Security Trust Plan and its included

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[12] Booth testified that he had been a member of the Plan since 1948 and that prior to his serving as a negotiator there had been discussions about what the plan consisted of. (A. 98) At the first meeting in 1967 the specific details of the Plan were allegedly requested. (A. 99) The Plan was discussed "many times . . . in that six-to-eight month period." (A. 100)

death benefit as "all one plan. Insurance, pension, everything was all one plan." (A. 102, 125)[13]

As to the inquiry made by Booth a day after the strike commenced, the Union asserts that Booth "*expressly* requested continued insurance coverage and *expressly* mentioned the Security Trust Plan." (Brief, p. 17) "Booth asked for Security Trust coverage (which coverage includes the life insurance incorporated as part of the Plan)." (Brief, p. 18) And it is asserted (page 19) that the Board rejected Booth's testimony and relied on that of Waters which was allegedly discredited. Finally, it is claimed at page 33, n. 21 that Booth indicated to Waters "that the Union was expecting to pay for all of the life insurance premiums, including the Security Trust Plan and its policy." It is also stated that Waters told Booth on two occasions that he would call him back. (Brief, pp. 18, 33)

A fair reading of Booth's own testimony (which was *not* credited generally, but only as to one specific point, see A. 422, and was discredited entirely as to the alleged requests for information, see A. 424) indicates that he had been informed shortly before the strike by McIntyre that the International Union would pick up the 412 group insurances, including the "other" or basic group life policy. (A. 101-02, 115-16, 125-26) McIntyre hadn't informed Booth of the arrangement with Williams, or spoken with Booth since before the strike began. (A. 116-17) Waters, of course, was out of the room when McIntyre and Williams had arranged

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[13] The Union's assertion on page 8 that Booth thought of the *insurance* as all one plan is an erroneous reading of the record. Booth's reply was obviously referring to his understanding of the *Trust Plan* as all one unit.

for continued coverages. (A. 165)

Booth discussed with Waters the question of whether the Union was going to pay the insurances, as McIntyre had informed him, and the method of payment—whether individually or as a group. (A. 102) He admitted to not asking Waters anything with reference, specifically, to the supplementary or death benefit insurance. (A. 101-02) As to the Security Trust Plan as a whole, he asked Waters how it was going to be taken care of. Waters didn't know but said he'd let Booth know. (A. 101) It is not claimed that Waters suggested to Booth that the Trust Plan or its death benefit were being continued or that the Union would be billed therefor. With reference to Booth's second conversation with Waters, Booth testified that Waters *called him* within the next month because the Union had not forwarded the premium payments they had been billed for. Booth allegedly inquired again as to how the Trust Fund was being handled and Waters still wasn't informed on it. (A. 103) *Booth nowhere testified that Waters indicated again that he would call him back,* nor was any such finding made by the Examiner.

Mr. Booth and Mr. McIntyre never once, during the whole period of the strike, discussed any problem as to the Security Trust Plan or its included death benefit. (A. 117) The only communication between them was apparently when McIntyre checked to see if the Company had sent the bill. (A. 63) Neither of these persons, or anyone else on behalf of the Union, including the Strike Insurance Department, did *anything at all during the remainder of the strike* to indicate dissatisfaction with the Company's handling of insurance coverages and the Trust Plan. At no time was a *request* made, on behalf of the Union, that the Company

continue the Plan or its death benefit.[14] And it is clear the Union knew or should have known that the Plan's death benefit was in danger of lapsing. Aside from what they can be presumed to have known, and what the record shows they knew, information as to this coverage was always in the hands of the Union in the form of precise billings. (A. 359 to 369)

These billings, as found by the Board, clearly excluded the Security Trust and "put the Union on notice that it did not understand the Union's request to include the Security Trust or its death benefit and the Union did nothing to change this impression." (A. 429-30) The Union contends (Brief, pp. 33-34) that there was no way the Union could have understood that the Trust Fund death benefit wasn't included. This is not so. The included coverages are itemized. The only life insurance mentioned is "Basic Group Life Insurance." No mention is made of the Security Trust. Further, the tab run indicated the amounts of life insurance coverage for each individual in thousands of dollars. These amounts are generally $6000 or $7000, with some at $12,000. (e.g., A. 361-63) Mr. Booth testified that he knew the basic group life insurance covered the employees for these amounts. (A. 127) The Security Trust death benefit was equal to two times annual salary, as stated in the booklet

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[14] As to the Currens incident (see pages 8, 9 and 33 of the Union's brief), it is not of itself significant. The Board not having found that the Company refused any adequate request, it declined to rule on what obligation, if any, the Company would have to honor an individual request. (A. 431) Since Currens did not lose any coverage and full Security Trust benefits were restored subsequent to the strike (A. 420, 161-62, 191-92, 195-96, 407, item 8), Currens was not aggrieved, nor was any other employee except Racely. And Currens' conversation admittedly took place after the Racely incident had occurred. (A. 416) The Board, by specifically referring to the incident, rebuts the Union's claim (p. 9, n. 9) that his testimony was ignored.

(A. 321) and the insurance certificate (A. 311—"24 times the Employee's Monthly Earnings"). McIntyre testified he was aware of these amounts. (A. 34) Thus, even a cursory examination by Booth or McIntyre would have indicated that only the basic group life insurance was being billed for.[15]

CONCLUSION

Reference is here made to the Board's brief, pages 10 to 12, wherein the applicable case law involved herein is cited. Reliance is especially placed on *General Electric Co.*, 80 NLRB 510, 511-12 (1948), and *Philip Carey Mfg. Co.*, 140 NLRB 1103, 1123 (1963) to the effect that insurance premiums are a form of remuneration akin to wages, and the same may, without notice to or bargaining with the Union,

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[15] The letters sent to Mr. Booth indicated the billings were for "the insurance which you asked us to continue." (A. 359, 365, 367) and the replies from the UAW Strike Insurance Department (A. 370 and 372) referred to "Insurance Coverage for Members of Local 412," and "Insurance Coverage for Life . . . for Members of Local 412." When Mr. Booth received the first billing he "glanced" at it and sent it on to the International Union. (A. 119) He *did not note* that the billing contained nothing with respect to the Security Trust Plan and that it did not cover any Security Trust Plan premiums. He "wasn't aware" of this. (A. 119) When asked whether he had any questions for Mr. Baker or the Company after receiving the billing, Mr. Booth replied:

> "I didn't have a chance to question him. I never saw it . . . This was mailed to me in the mail. I never saw this . . . When I received that I didn't question it. *It appeared the UAW said they would pick up the tab and so I sent it on to them.*" (A. 121; See also A. 127) (emphasis added)

be unilaterally discontinued during a strike.[16]

The Union seeks to distinguish these cases, and the requirement of *at least* a clear demand and refusal, by asserting that what the Company did was to *deny the Union the right to continue the death benefit coverage.* (See Brief, 21, 22, 23, 25, 33 and 35) The Company is said to have refused to cooperate, to have misled the Union, confused the Union, prevented the payment, etc. *Id.* All of these allegations simply amount to the same question: Did the Company refuse a clear request? Of course this is precisely the factual issue the Board decided in the negative.[17]

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[16] *Philip Carey* stated, inter alia:

> "In General Electric Co., it was held that an employer did not violate Section 8(a) (3) or (1) of the Act by according to strikers less favorable treatment than nonstrikers with respect to vacation and pension benefits. Equating such 'deferred benefits' to wages, the Board stated, 'It is axiomatic that the Respondent is not required under the Act to finance an economic strike against it by remunerating the strikers for work not performed.' It follows that the Respondent's discontinuance of group insurance contributions for the strikers was not discriminatory nor does the General Counsel so contend . . . It is axiomatic that an employer has no duty to negotiate about stopping wage payments to strikers with respect t. the period of the strike. By the same token, if, as the Board, in effect, held in General Electric, supra, monetary benefits, such as the Respondent's group insurance contribution, are equivalent to wages, it necessarily follows that the Respondent was free to discontinue them without consulting the Union." 140 NLRB at 1123.

[17] As to the Union's contention that the Employer's obligation is somehow affected by the leave of absence provisions of the Security Trust Plan or insurance contracts, or past practice in this respect, (see Brief, p. 22) see *Ace Tank and Heater Co.*, 167 NLRB No. 94 (1967) wherein the Company's discontinuance of monthly medical insurance for the period of the strike was held lawful. The layoff, leave of absence and conversion features of the policy were nearly identical to those here involved. The Board held that all that was required of the employer was full reinstatement of benefits *after* the strike. The death benefit coverage here involved was fully restored for returning strikers and they were *credited*, for pension purposes, with strike time. (A. 420; 33, 161-62, 195-96)

Finally, the Union relies on the well-known doctrine that strikers do not lose employee status because of a strike. (See p. 24, n. 16) And that the Company may not change a term of employment without prior bargaining. (See p. 35) This is semantics. The record shows that premium payments on the death benefit were rightfully not paid for the Local 412 members, because, like wages, they had *ceased to be earned*. Whatever duty exists with respect to *other* terms of employment—the law is clear that these matters may be unilaterally discontinued—*Philip Carey, et al, supra*. And, as noted, it is not claimed that the terms of employment of any returning striker were changed or impaired.[18]

The Company in this case cooperated with the Union, and made detailed arrangements to accommodate the request that was made. It sent individually calculated billings detailing the continued coverages. It does not appear *anywhere on this record* that the Company did anything with the slightest anti-Union motivation.

Its cooperation apparently was absolutely satisfactory to the Union—until Mr. Racely's passing. Suddenly the Company had *failed* and *refused* to do what it should have. But in reality the Union had *failed* to exercise even the minimum competence of representation called for by its status

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[18] The same kind of semantic argument is made by the Union with respect to the *Great Dane* line of cases. (See pp. 20, 21, 22, 23, 24, 35, n. 22) It is stated, at page 20, that the employees were denied "already accrued insurance coverage." Of course the Board in *Great Dane* (150 NLRB 1459 n. 2) specifically distinguished the discontinuance of payment of insurance premiums from the denial of accrued or vested benefits. No employee was denied coverage after the strike. Coverage is solely dependent on premium payments, and as such is a continually earned benefit, not an "accrued" benefit such as already earned vacation pay.

and the law. The record evidences a total lack of initiative on the part of the Union. It reveals a total absence of any systematic, conscious effort by the Union to intelligently deal with the question of insurance coverages.

The incredible picture of laxness on the part of the Union throughout the whole period in question, the obvious cooperative attitude of this Employer, the telling picture painted by the timing of the charges—the obvious facts of the matter, all seriously undermine the assertion that the *Company* caused the unfortunate incident herein. The blame is surely on the Union here for failing to adequately represent its members.

We urge the Court to reject the Union's simplistic credibility approach to this case and to the Board's opinion, and to grant to the Board that function which it is so ably constituted to perform under the National Labor laws—the function of making informed judgments based on all the record facts, even though its judgment and inferences may differ from that of a particular trial examiner. This is a case peculiarly calling for the Board's expertise. It behooves the Court to respect the Board's judgment on the whole record.

RELIEF

For the above reasons, it is respectfully submitted that the petition to review should be denied.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 23,978

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, UAW,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

and

UNITED STATES SMELTING, REFINING
AND MINING CO., AND ITS WHOLLY-
OWNED SUBSIDIARY, MUELLER BRASS CO.,

Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF OF PETITIONER, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER THE BOARD ERRED AND EXCEEDED ITS POWER AND AUTHORITY BY REVERSING THE TRIAL EXAMINER'S CREDIBILITY RESOLUTIONS AND BY REJECTING UNCONTRADICTED EVIDENCE?

Petitioner contends that the answer is, "YES".

II. WHETHER THE EMPLOYER VIOLATED §8(a)(3) AND (1) OF THE ACT BY MISLEADING EMPLOYEES WHO INQUIRED ABOUT THE SECURITY TRUST PLAN, BY REFUSING TO ACCEPT PREMIUM PAYMENTS FROM EMPLOYEES BECAUSE THEY WERE ON STRIKE, AND BY DENYING RACELY'S WIDOW HER INSURANCE CLAIM BECAUSE RACELY PARTICIPATED IN THE STRIKE?

Petitioner contends that the answer is, "YES".

III. WHETHER THE EMPLOYER VIOLATED §8(a)(5) AND (1) OF THE ACT BY FAILING TO SUPPLY THE UNION WITH REQUESTED INFORMATION CONCERNING INSURANCE COVERAGE OF BARGAINING UNIT EMPLOYEES AND BY MISLEADING THE UNION AS TO ITS INTENTIONS REGARDING THE SECURITY TRUST PLAN?

Petitioner contends that the answer is, "YES".

This case is before the Court for the first time.

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* An "*" indicates that the cited case is one upon which petitioner places principle reliance.

REFERENCES TO RULINGS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 23,978

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BRIEF OF PETITIONER, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

STATEMENT OF THE CASE

This case is before the Court upon the petition of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (the "Union" or "UAW") pursuant to §10(f) of the National Labor Relations Act (the "Act"), as amended (61 Stat. 136, 73 Stat. 519,

29 U.S.C. §151 et seq), to review and set aside an order of the National Labor Relations Board (the "Board") dismissing a Complaint filed against United States Smelting, Refining and Mining Co. and Its Wholly-Owned Subsidiary, Mueller Brass Co. (the "Company") on November 14, 1968. The Board's Decision and Order[1] is dated December 9, 1969 and is reported at 179 NLRB No. 159. A Motion for Reconsideration was filed by petitioner, but was denied without comment on January 29, 1970. The latter Order is unreported, but is reproduced in full in the Appendix at p. A-432. The Court has jurisdiction of the proceedings under §10(f) of the National Labor Relations Act.

I. The Facts[2]

A. Background

Respondent maintains a facility at Port Huron, Michigan wherein it employs 1800 production and maintenance employees who are represented by UAW, Local 44; an unspecified number of skilled craftsmen who

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1. Reprinted as part of the Appendix, pp. A-428-431. All references to the appendix shall be designated "A". Those references preceding a semi-colon are to findings of the Trial Examiner and/or the Board; those following to the evidence.

2. Throughout this brief (unless otherwise indicated) we rely on facts as found by the Board. However, in those instances where the Board has reversed credibility findings we shall so indicate and point out why the Trial Examiner's findings should be adopted rather than the Board's.

are represented by IAM Local 218, about 70 salaried technical employees who are represented by UAW, Local 412, and other employees and supervisors (A-412). It is the technical unit with which we are concerned herein.

All employees are covered by a basic group life insurance policy and by medical and hospitalization plans with the cost borne by the employer. In addition, employees have the option of participating at their own expense in a major medical plan (A-412). Respondent also maintains a voluntary Salaried Employees' Pension Plan. Eligible for membership therein are all salaried personnel, including the employees in the technical unit, who are between 30 and 60 years old, and have been employed by the Company continuously for 5 years, the last two on a full time basis (A-412; 315, 319). The cost of this plan is borne jointly by the Company and the employee members (A-412; 321) with the Company's share going towards "provid[ing]...[an employee's] monthly retirement income" (A-207, 318).

The Plan provides that participating employees (defined in the Plan as "members") are entitled to certain retirement and disability benefits, and to a "death benefit" (A-412; 318-320). As described to the employees, the death benefit was "paid to your beneficiary in the event of your death before retirement" (A-318, emphasis added). Again at p. 5 of the booklet describing the Plan, the employees were told that one of the Plan's 5 benefits was:

"[a] Death Benefit payable to an employee's beneficiary in the event of the employee's death before or after retirement." (Emphasis added) (A-320).

Indeed, the booklet stated as the Plan's purpose:

"...This plan is designed to give you a monthly income after retirement...or, should you die before retirement, insurance benefits to your dependents." (Emphasis added) (A-317).

The Plan further specified that the "Death Benefit" was provided for by a group insurance policy. In addition to the statement regarding life insurance is the statement of purpose quoted from above (A-317) the booklet stated that:

"If death should occur before you actually retire, your designated beneficiary will be entitled to receive the proceeds of life insurance in an amount equal to two times your annual base salary...

* * * * *

"Death benefits are covered by a Group Life Insurance Policy issued by the Massachusetts Mutual Life Insurance Co. 3/ (Emphasis added) (A-320).

As set forth at A-315-327, an employee maintains his membership in the Plan until he decides to withdraw his contributions whether he is still an employee or he has been terminated (See questions 15 and 16 at A-323). Insurance benefits are to be paid if the employee dies prior to his retirement (A-321). Nowhere in the booklet are they made contingent upon

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3. Sometime after the issuance of the booklet, the carrier was changed to the Prudential Insurance Co. (A-412, n. 1)

active employment. Thus, the thrust of the Plan was to provide a member with retirement and disability benefits. In the event of death before retirement, an employee's beneficiary would receive the proceeds of a group life insurance policy. The employees were never informed of any requirement that they had to be "actively engaged in work" in order to be covered by the insurance policy (See A-315-327 which constitutes the only information given the employees). Nor were the employees or the Union ever informed that the life insurance provision would lapse should an employee temporarily cease "active work" (A-413). Neither the actual Plan nor the Group Life Insurance Policy was ever shown to any union official or to any bargaining unit employee (A-413).[4/]

B. The Failure To Supply The Union With A Copy Of The Master Agreement Underlying The Pension Plan

At the first bargaining session between the parties (in February 1967) the UAW asked the Company for a copy of the "Security Trust Plan." The Company indicated that it would supply the Union with a copy (A-24, 36-37, 98-99, 108). Subsequently, in June 1967 after receiving a Company contract proposal, the Union again asked for a copy of the "Security Trust Plan." Again, the Company indicated that it would supply the copy

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4. The Board found (A-430) that the Union was "fully aware of all the various benefits enjoyed by the employees it represented." However, it also found (A-430) that the Union "was not fully aware of all the intricate financing arrangements." Moreover, the only information the Union had was that contained in the booklet distributed to employees (A-315-327), for despite repeated requests for information concerning the plan, all that the employer supplied was the booklet (infra, sub-head B).

(A-25, 42, 99-100, 108). However, it was never supplied until August 1968, well after the death of Mr. Racely (A-24).[5/]

C. The Company Refusals To Correctly Advise The Union And The Striking Employees As To The Status Of The Pension Plan Or As To Whether The Insurance Had Elapsed, And The Company Refusal To Accept Tendered Premiums From Striking Employees

On April 29, UAW Local 44 was holding its final bargaining session with the Company prior to its strike deadline. Present as an observer, was Alex McIntyre who had been bargaining on behalf of Local 412. He was present because the members of Local 412 were planning to strike with the members of Local 44 (A-413-414; 27). The meeting had lasted through the night before and into the morning of April 29, at which time the parties gave up. On the morning of April 29, UAW Locals 44 and 412 went on strike (A-414; 27).[6/] As the meeting was breaking up McNeil, a representative of Local 44, asked the Company "to keep the insurance

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5. The Trial Examiner found no violation on these facts. In so ruling he relied on International Representative McIntyre's testimony that "they hadn't refused" to give him the information (A-46). However, he overlooked McIntyre's other testimony noted above and his other statement that "they agreed to give it to me, but just never did" (A-70-71, see also A-51). We do not allege a refusal to supply information, but rather a failure to do so. Accordingly, we submit that the Board erred in failing to find this violation of §8(a)(5) of the Act.

6. Although the Trial Examiner categorized the walk-out as a quitting of work, we believe that he meant that they walked out on strike. It is for this reason that we excepted to his categorization of the membership action. The Board did not discuss this point in its Decision, probably because of its decision concerning the main issues presented to it.

for Local 44 employees in effect as the life insurance, sick and accident insurance, and the health insurance." Mr. Williams answered Mr. McNeil that if the UAW would pay the premiums on the insurance that it would keep them in effect (A-414; 28-29). Mr. McIntyre then approached Williams and asked him "to keep the life insurance, the hospitalization in effect for the salaried employees..." (Emphases added). Williams again answered that he would, "providing the UAW would pay the premiums." (A-414; 29) At the time McIntyre made this request of the Company he was aware that there was life insurance in effect for all of the employees. He was also aware that there was a death benefit in connection with the Security Trust Plan, but he did not know whether this group life insurance ("death benefit") was a seperate policy or not (A-412; 29-30). The Union agreed to pay the premiums (A-421; 101-102). At no time did Williams indicate to McIntyre that the Company would not continue the group life insurance under the Security Trust Plan.[7/]

On May 1, Ivon Booth, a member of Local 412's bargaining committee, went to the plant with McNeil and Ray Matheson, both of Local 44. Booth spoke with George Waters, respondent's manager of labor relations. He asked Waters "whether or not the union was going to pick up 412's

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7. The Board found that the Union's request was not "sufficiently clear" to apprise the Company of its desires (A-429). However, we shall show below (pp.12-19) that this finding is not supported by the record and that the Board improperly overruled credibility findings in order to reach its conclusion.

insurance along with 44's, and...the UAW would pick it up if they were billed, to carry on our insurance, and he asked Mr. Waters about the Security Trust, how that would be taken care of..." Waters responded that "he did not know but that he would let him know." (A-415; 101-103). Booth further testified that he thought all of the insurance was in "one plan," he "thought it was all just one unit." Booth also asked Waters "about our hospitalization and other life insurance and the Security Trust Plan." Waters again stated that he "did not know for sure whether the UAW would pick it up or not. Waters also told Booth that he did not know how the pension plan would be handled, (A-415; Tr 102-103) Waters told Booth that he (Waters) would call Booth later on with the information. He never called Booth (A-415, 421; 103).[8/]

After the death of Racely (see infra, sub-head D) striking employee Howard Currens became worried about his own security: Currens is 63 years of age, and has worked for the Company for more than 43 years. He went to the office to speak with management about the Security Plan. He first spoke with Waters, telling Waters that he (Currens) had heard that the Company "was picking up our insurance and trust fund, and that the union would repay them." He asked if Waters knew anything about that. Waters answered that he did not (A-417; 73-74). Currens

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8. Here again, the Board overruled credibility resolutions in order to reach a different conclusion regarding these facts (A-430). We show below that the Board acted improperly in ruling as it did.

then went to Harold Loftis, the Company's Insurance Manager, and asked the same question. He also "asked him if I could pay my own, because at my age it was serious business, and he was there to take care of it." Loftis replied that he could give no answer because "it was out of [my] hands." (A-417; 74)

Currens then went to see James Sharkey, respondent's Vice President of Finance. Currens told Sharkey that he had "just come home and [had] heard about what had happened" and he was "there to pay [his] trust fund and [his] insurance, and [he] wanted to pay it six months in advance because [he] did not know how long [he] was going to be out [on strike]." While he made his statement he had his check book out and was prepared to write a check for the amount due. (Currens was aware of his share of the premium and was prepared to pay it as well as the Company's share (A-77)). The only response he received from Sharkey was that the Vice President would telephone him at home after 2 p.m. that afternoon. When asked, on the witness stand, if he received that phone call from Sharkey, Currens replied, "not yet." (A-416; 75-76).[9/]

D. Denial Of The Racely Insurance Claim

William A. Racely became an employee of respondent on or about December 31, 1942 (A-411; 5-6, 218, 224-225, 233)). He was a member and participant in the Company's Security Trust Plan (A-411; 6). As a

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9. Currens testimony was not rebutted, yet the Board ignored it in reaching its decision.

member and participant in the plan, he made periodic contributions to the plan (A-411, 412; 321) and he was entitled to receive its benefits, including coverage under its supplementary life insurance plan (A-412-413; 318-320). On April 30, Racely went on strike along with the other employees in the salaried bargaining unit (A-412-413). He participated in the strike until his death on June 22 (A-6, 225, 233). On July 9, Racely's widow spoke with Sharkey. She presented him with her copy of the life insurance policy[10] and told him that she wanted a cash settlement (apparently, as opposed to a monthly income payment) (A-6, 130-131; 220). Sharkey replied that she could not collect on the policy, that all she could have was her late husband's contributions to the plan plus 2 1/2% interest. He explained that her husband had "terminated his employment at Mueller Brass" by going on strike (A-419, n. 4; 131-133).[11] McIntyre then called the Company and spoke with Baker about Racely's insurance. Baker told McIntyre that Racely "was not an employee of the Company and therefore was not covered by the plan" (A-419; 31-32). It is also noteworthy that this discussion took place shortly before Sharkey

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10. She had the Massachusetts life insurance policy, although the Company by then had switched to Prudential (A-419; 131). There is no evidence as to the contents of the Massachusetts policy nor is there any evidence concerning whether Racely or others were given copies of the new policy. In any event, we submit that the contents of the policies are irrelevant in view of the booklet (A-315-320) given the employees which describes the benefits to which they are entitled.

11. Mrs. Racely did receive the proceeds of her husband's other insurance policies as the employer did allow the UAW to pay the premiums on that one when they fell due (A-412).

told Currens that he did not have any information concerning the handling of the Security Trust Plan and the insurance policy contained therein.)

II. Findings And Conclusions Of The Trial Examiner

The Trial Examiner found that the above facts set out violations of the Act by the Company. He found that the Company violated §8(a)(3) &(1) of the Act by refusing to cooperate with the Union's desire to maintain in effect, at Union expense, the life insurance coverage of the striking employees, and by withdrawing benefits from striking employees while maintaining them in effect for non-striking employees. He also found that the employer refused to furnish information to and misled the Union with respect to the life insurance premiums while the employees were on strike, thereby violating §8(a)(5) & (1) of the Act. He further found that the Employer's withdrawal of the accrued benefits restrained employees from engaging in concerted activity, this in violation of §8(a)(1) of the Act (A-416-423).

III. Findings and Conclusions Of The Board

The Board, without saying so, reversed critical credibility resolutions made by the Trial Examiner and dismissed the entire Complaint. The Board reasoned that the Union's request for the continued group life insurance coverage was not sufficiently clear to be understood by the employer to include the security trust group life insurance coverage (A-430).

ARGUMENT

I. The Board Exceeded Its Power and Authority By Reversing The Trial Examiner's Credibility Resolutions and Rejecting Uncontradicted Evidence

The Supreme Court has stated, in NLRB v. Pittsburgh S.S. Co., 337 U.S. 656, that a Trial Examiner's credibility resolutions are to stand, unless the credited evidence "carries its own death wound" or the discredited evidence is "irrefutably true." Accord: Universal Camera Corp. v. NLRB, 340 U.S. 374, 496. The Labor Board, in its oft-cited decision in Standard Dry Wall Prods., Inc., 91 NLRB 544, said that credibility resolutions of a Trial Examiner will not be disturbed unless "a clear preponderance of all the relevant evidence" (emphasis added) compels a different result. In these cases, and the thousands that cite them, the courts and the Board have enunciated the general doctrine that credibility resolutions are basically within the province of the Trial Examiner. The Board's function is simply to find facts based upon these resolutions and then to decide whether such facts make out a violation of the Act. However, in the guise of deciding factual issues, the Board is not to delve into credibility resolutions, especially those in which demeanor plays a part, id. We show below that there was no evidence so compelling as would justify the Board's overruling the credibility resolutions herein. The rejected evidence was not "irrefutably true," the credited evidence did not "carry its own death wound." Rather, as we shall demonstrate below, the

credited evidence presents a rational and logical picture of the facts, whereas, the discredited evidence presents a confusing, distorted picture.

The particular evidence with which we are herein concerned, is that which deals with the various discussions between Union officials and members and management officials. It is not disputed that the bargaining unit employees are covered by a number of insurance programs. One of them is a group life insurance plan that covers production and maintenance employees as well as the salaried employees with whom we are concerned (A-412). In addition, bargaining unit and other salaried employees can elect to participate in a Security Trust Plan which includes as one of its benefits a group life insurance plan (A-412; 318-320). As described to the employees, the proceeds of a group life insurance policy, or "death benefit" as it was sometimes labelled, was "paid to your beneficiary in the event of your death before retirement" (A-318, emphasis added). Again, at p. 5 of the explanatory booklet (A-320) the employees were told that one of the Plan's five benefits are:

> "[c] Death Benefit payable to an employee's beneficiary in the event of the employee's death before or after retirement" (emphasis added).

Indeed, the Plan's purpose was explained as:

> "...designed to give you a monthly income after retirement...or, should you die before retirement, insurance benefits to your dependents." (A-317, emphasis added)

The booklet further specified that the "Death Benefit" was provided for by a group insurance policy. In addition to the statement quoted above (A-317) the booklet stated that:

> "If death should occur before you actually retire, your designated beneficiary will be entitled to receive the proceeds of life insurance...
>
> * * * *
>
> "Death benefits are covered by a Group Life Insurance Policy..." (A-321, emphasis added)

Thus, the uncontradicted, documentary evidence demonstrates beyond cavil that the unit employees were covered by a group life insurance policy over and above the group life insurance policy covering all employees. The employees were told by the employer-supplied booklet that a group life insurance plan was part of the Security Trust Plan. At no time were any employees shown the master insurance policy or the actual Security Trust Plan Agreement (A-413; 101-102).

When the Union was about to embark upon its strike, it requested the Company to keep the employees' life insurance in effect, offering to pay the premiums. The Board's finding that the Union's "initial request...was phrased in general terms and did not include a specific reference to the Security Trust or its included death benefit" constitutes a rejection of credited evidence. McIntyre's credited and essentially uncontradicted testimony was as follows:

> "THE WITNESS: Right. They asked Mr. Williams--Mr. 'McNeely' asked Mr. Williams--to keep the insurance for Local 44 employees in effect as the life insurance, sick and accident insurance, and the health insurance.

TRIAL EXAMINER: This Local 44 is not the one that was involved in this case?

THE WITNESS: No. They are not involved in this case. I'm just saying what was taking place on that date.

TRIAL EXAMINER: What caused this officer of Local 44 to say that? Were the employees represented by Local 44 also contemplating a strike?

THE WITNESS: They were.

Q (By Mr. Niforos) What employees did Local 44 represent?

A Production employees.

Q What local, if any, was representing the technical employees in the unit we are discussing here?

A Local 412, UAW.

Q Go ahead. What happened at the April 29th meeting?

A After 'McNeely' asked Mr. Williams to keep those insurances in effect I then approached Mr. Williams and asked him to keep the life insurance, the hospitalization in effect for the salaried employees, and he said he would if--

TRIAL EXAMINER: Your people were the salaried people?

THE WITNESS: That's right.

TRIAL EXAMINER: All right.

THE WITNESS: He would, providing the UAW would pay the premiums."

(A-31-32, emphasis added.) See A-414, 421. Williams' testimony does not contradict McIntyre's. He admitted that Local 44's representative

asked for continuation of the "life and hospitalization" insurances (A-414) and that McIntyre asked for "the same thing." Thus, Williams knew that McIntyre wanted continued coverage under the group life insurance programs. The Trial Examiner found that McIntyre's request specifically included group life insurance and Williams knew it (A-414). By finding otherwise, the Board has rejected uncontradicted evidence and has overruled the credibility resolution referred to above.

[At this point it is noteworthy to add that the Union did not know the basic details of the Security Trust Plan. All they knew is what they were told--that the Plan contained a Group Life Insurance Policy as one of its benefits. They could rely only on the employee booklet for information as the Company, despite repeated requests to do so, had failed to supply the Union with a copy of the Plan or of the Master Policy (A-423-424; A-24-25, 36-37, 42, 51, 70-71, 98-100, 108). There is no basis in the record to infer Union knowledge of the workings of the Plan (See A-29-30). Certainly, there is no basis upon which to jump from the finding that the Union agreed to a continuation of the Plan to the conclusion (A-430) that it knew enough about its secret, "inner workings" (A-421) to be more specific in its request, especially here, where the lack of Union knowledge results from the Company's failure to live up to its bargaining obligation. As the Complaint alleges the Company violated §8(a)(5) by failing to supply the requested information. The Trial Examiner failed to find

such violation, but the Charging Party has excepted to that finding, and the Board's Decision is silent on the issue. See IUE v. NLRB (Tiidee Products), ___App. D.C.___, ___F. 2d___, 73 LRRM 2870 (D.C. Cir.,##22797 and 22911, April 3, 1970).]

If there was any confusion in the Company's mind about the Union's request, the discussions between representatives of the Union with representatives of management certainly cleared it up. On the second day of the strike, Ivon Booth, a member of the Union's bargaining committee, spoke with George Waters, the Company's Manager of Labor Relations. Booth testified that:

> "I told [Waters] I had been informed the UAW would pick it [the premiums] up if they were billed, to carry on our insurance, and I asked Mr. Waters about our security trust, how that would be taken care of, and he said he didn't know but that he would let me know (A-101-102, emphasis added).

The above testimony was specifically credited (A-421-422). Thus, it is clear the Union expressly requested continued insurance coverage and expressly mentioned the Security Trust Plan. How much clearer can the Union get? As Booth stated, he was unsure of the specific provisions of the Plan, never having seen it, and he thought that the insurance was included in the Plan (A-102-103, 106). This, we submit, is quite reasonable since Booth, as did all the employees, received his information concerning the plan from the employer-supplied booklet. As we have shown, on April 29, McIntyre asked for life insurance coverage

and, one day later, Booth asked for Security Trust coverage (which coverage includes the life insurance incorporated as part of the Plan) [12] if the Company was unclear as to whether a request for "life insurance" included the life insurance in the Security Trust Plan, ostensibly because the latter insurance was part and parcel of the Plan, certainly a request for continuation of the Plan (as was made by Booth on May 1 [supra, p. 17]) would include the Plan's insurance provision.

And, there is more. A few weeks later, during a telephone conversation, Booth again asked Waters "about the trust fund, if that was how it was going to be taken care of or what happened to it..." (A-103). On both occasions Waters professed ignorance and promised to call Booth and advise him of the facts (A-415-416, 422; 103). He never did (A-415-416, 422; 103).

The Board, in finding as it did, either overruled or ignored the Trial Examiner's credibility resolution that Waters undertook to fully advise Booth about the status of the Security Trust Plan and that he never carried through on his word. Rather, the Board relied completely on the "itemized bill for the premiums respondent had paid" which the Board felt "clearly" does not include payments for "Basic Group Life Insurance" (A-358-363), yet the employees knew from the employer-

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12. Waters is the administrator of the entire insurance program for the salaried employees and must be aware that the Security Trust Plan includes a group life insurance policy (A-104-105). The Trial Examiner so found (A-421).

supplied booklet that the Security Trust Plan's death benefit was encompassed in a "Group Life Insurance" policy (supra, pp. 3-5. See A-164) and Booth again questioned Waters in order to clarify in his mind, whether or not the Security Trust Plan was covered by the bill. Waters again claimed ignorance (A-421; 106). Waters, although called as a witness, did not testify about the second conversation. The Board has erroneously rejected this credited evidence, and instead, has relied upon the discredited evidence of Waters whose testimony was vague and equivocal (A-415-416, 421-422; 168-169). [13/] In so doing, the Board has violated the principles set forth in Pittsburgh S.S., supra; Universal Camera, supra; and Standard Dry Wall, supra.

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13. In addition, Company witness Baker testified that he "understood" the Union (Local 412) to be asking only for the same life insurance coverage as was asked for by Local 44. He based his claim on the fact that Local 44 asked for "life and hospitalization insurance" (A-156). He then testified that McIntyre said "we want it too" (A-156). Somehow he imputes from this that McIntyre was thereby asking for only the one life insurance policy and not the other. However, he admittedly knew that Local 412 also wanted the major medical insurance carried on (Local 44 does not have either the Security Trust Plan or major medical) and he billed the Union for it. When asked why he read a "major medical" request into McIntyre's statement and not the second life insurance policy, he replied, "I don't know" and "I can't answer that" (A-157-158). Mr. Williams was also unable to explain this (A-204-205). The different treatment the Employer accorded MyIntyre's statements concerning the various requests he made lends great weight to our contention that the Company engaged in these subterfuges in order to deceive the Union and in order to punish its employees for going on strike. The Board, in relying on Williams' and Baker's testimony to establish lack of clarity, ignored the inconsistencies cited here, and thereby overruled the Trial Examiner's credibility resolutions (A-421).

II. The Employer Violated §8(a)(3) and (1) of The Act By Misleading Employees Who Inquired About The Security Trust Plan, By Refusing To Accept Premium Payments From Employees Because They Were On Strike, and By Denying Racely's Widow Her Insurance Claim Because Racely Participated In The Strike.

It is axiomatic that an employer may not discriminate against an employee simply because that employee is on strike. Thus, an employer cannot discharge, suspend, discipline, or deprive the striking employee of any benefits to which he is entitled, because of the fact that the employee is on strike. NLRB v. Great Dane Trailers, 388 U.S. 26, is right on point. There, employees on strike were denied their already earned vacation payments while employees not on strike were not. Here, an employee on strike was denied his already earned insurance coverage while employees not on strike were not. Additionally, employees on strike were denied the right to continue making their insurance payments while employees not on strike were not. As the Supreme Court stated:

> "The act of paying accrued benefits to one group of employees while announcing the extinction of the same benefits to another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity." id at p. 32.

Accord: NLRB v. Erie Resister Corp., 373 U.S. 221, 228, 231; NLRB v. Brown, 380 U.S. 278; Pioneer Flour Mills v. NLRB, __F. 2d__, 74 LRRM 2343, 2345 (5th Cir., #27495, June 1, 1970); Tex Tan Welhausen Co. v. NLRB, 419 F. 2d 1265, 1271-1272.

Racely was not the only employee affected by the Company's action.

All striking employees were denied their already accrued insurance coverage because of the Company's refusal to cover them and concurrent refusal to allow them to pay for their own coverage. As the facts make clear [supra, pp. 3-5] employees who become members of the Plan remain members and are entitled to all of its benefits until they retire or terminate their membership in the Plan. Termination of membership is effectuated as outlined in the answers to questions 15 and 16 in the booklet given employees (A-316, 323)--an employee simply requests his contributions back. It is also clear from the exhibits and testimony that the employees could maintain their membership simply by continuing to make their contributions to the Plan--indeed, life insurance premiums were to be paid out of the employee's share of the contributions to the Plan.[14/]

The above facts render inconsequential the Company's reliance on General Electric, 80 NLRB 510. In G.E. the Board clearly stated that an employer may not impair a striking employee's job tenure or conditions of employment other than wages simply because he is on strike. The Board's other holding in that case--that the employer may pay wages and other payments for work being currently performed to non-striking employees while denying them to striking employees--is not applicable here for, here, the

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14. Although the Company claims that it is not possible to tell which money goes where, the Plan's terms as explained to the employees are clear. A-316, 318 (#5 of list of benefits) states that the Company's money goes towards paying the difference between the employee's contribution and the cost of the retirement fund, leaving the clear impression that the employee's contribution pays the life insurance premium as well as part of the retirement fund cost. In addition, the Prudential master policy (A-301, 304) states that the premium shall be taken from the employee's contribution.

employer has denied striking employees the right to continue their already accrued vested benefits and the right to continue making payments to their already existing insurance plan. We claim here that when an employer gives employees the right to make the insurance and retirement payments when they are not actively at work due to illness, leave of absence, etc., that employer is also obligated as a matter of law to allow them to make the same payments when they are not actively at work due to their being on strike. To do otherwise, is a clear deprivation of benefit because of employee engagement in concerted activities and is prohibited by §8(a)(3) and (1) of the Act. As the record demonstrates, the Company does allow these payments from non-striking absent employees (A-81-90). Indeed, in at least one instance, the Company paid the premiums for the absent employee (id). However, in this strike situation, rather than allow the Union to pick up the payments on behalf of the employees the Employer simply let the policy lapse. [15/] Tex. Tan Welhausen Co., supra.

Likewise, Philip Carey, 140 NLRB 1103, is inapposite. First, the language relied upon by the Company below was only that of the Trial Examiner. The Board did not speak to the issue concerning that action of the Employer there. Of even greater import is the fact that the issue about which the

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15. The Company, as we shall show below, misled the Union into thinking that it would allow the Union to make the payments by responding affirmatively to the Union's request (A-414-415, 421; 27-30, 101-103) and then simply billing for only one policy and not the other. This tactic, we submit, compounds the violation for it shows the Company's unwillingness to even reveal its position to the Union (see infra). The Board, in ruling as it did, overruled these credibility findings as well as those referred to supra, pp. 12-19.

Trial Examiner spoke involved an employer's duty to bargain about discontinuing its payment of wages and related payments during the strike. Here we are concerned with the Employer's discontinuance of already accrued benefits, the right of the employees or their Union to pay their own insurance premiums, and with the Employer's misleading the Union and the employees into believing that the Union was paying the premiums when, in fact, the Employer had prevented such payments from being made. Further, in Philip Carey the Board found that bargaining was at an impasse when the strike began. Here, no impasse existed concerning the continuation of the Security Trust Plan and its life insurance policy (A-49, 345-349).

We submit that such a denial of benefits and such a callous disregard of the truth when answering the questions of the Union's representatives and of the employees, places this case squarely within the holdings of Great Dane Trailers where, as noted above, vacation payments were denied only to striking employees and NLRB v. Erie Resister, supra, where seniority rights of striking employees were made subservient to those of non-strikers. Accord: Pioneer Flour Mills, supra; Tex Tan Welhausen, supra; Cone Bros. Contracting Co., 158 NLRB 186; Duncan Foundry & Machine, 176 NLRB #31. The Fifth Circuit's language in Tex Tan Welhausen is particularly relevant here. There, striking employees were denied already accrued vacation pay benefits. This court, in holding that denial to be a violation of the Act stated:

> "Moreover, Tex Tan's claim that there was no discrimination here is deceptive. It is true that on

> its face the vacation policy could be applied to all employees, strikers and non-strikers alike. Nevertheless, it is equally clear that the result in this case was that the strikers were injured because they exercised their right to strike. There was no way under Tex Tan's policy that an employee who remained on strike for the full term of the strike could receive vacation pay." supra, 419 F. 2d at 1272 (emphasis added).

The Company, however, grasps at one last straw in an effort to excuse its conduct herein. It claims that had it kept the policy alive during the strike by accepting and forwarding the premiums it would have committed a "fraud" on the insurance company by violating a term of the contract requiring the insureds to be "actively engaged in work." Such a contention is an obvious effort at post hoc rationalization for the record is clear that the Company never relied on this in its discussions with the Union, the questioning employees or even with Mrs. Racely. Rather, it consistently relied on its specious contention that the employees had "terminated" their employment by going on strike and therefore were no longer covered by the Plan.[16/] Further, the facts show that the Company itself "waived"

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16. Employer's contention that the employees lost their protection because they "terminated" the employment relationship and embarked on an economic "war" with the Employer is patently without merit. The Board and Courts have repeatedly made clear that, absent some circumstances not present here, striking employees remain employees throughout an economic strike, and therefore remain within the protective umbrella of the Act. Indeed, treating a striking employee as "terminated" is in itself a violation of §8(a)(3). See, e.g., NLRB v. Burnup & Sims, 379 U.S. 21, 23.

Furthermore, if they had, in fact "terminated" their employment, it is inconceivable that they would still be covered by the other group life insurance plan which, we submit, required that the insured be "actively employed" by the Employer. Yet Mrs. Racely received benefits from that policy. (See A-420-421).

a medical examination required by the policy upon "reemployment" (A-300, 304). Certainly, as the Trial Examiner found:

> "[I]f a new physical were indeed required under this policy, it is doubtful Prudential Life would permit [the employer] to waive the condition. [Williams'] statement instead strengthens the finding that the strikers never lost their employment status, even under the insurance agreement." (Emphasis added) (A-420, n.5).

Additionally, as the Trial Examiner further found:

> "...nowhere...does the Respondent assert even now that had it chosen to pay these premiums, or permitted the Union to attempt it, Prudential Insurance would not have accepted them." (A-420-421).

In any event, the Company cannot rely on the language of the insurance policy since its booklet (A-315-327) states otherwise and the Company must be held responsible for its own words and deeds. This proceeding does not involve Prudential Life, but rather, involves the named Employer. See, Cone Bros., supra, 158 NLRB at 188.

Thus, the Company, by depriving employees and their Union of the right to make the employees' insurance and retirement payments because they were on strike, thereby causing them to lose their insurance protection, violated §8(a)(3) and (1) of the Act. Further, by misleading the Union and by withholding information from questioning employees concerning their insurance coverage because they were on strike, the Employer violated §8(a)(1) of the Act (misleading the Union, as we shall show next also constitutes an 8(a)(5) violation). Because of the Employer's violations of the Act, Racely's insurance expired and therefore the Employer should have been

ordered to make his widow (or beneficiary) whole for any losses she has suffered as a result thereof, as recommended by the Trial Examiner.

III. The Employer Violated §8(a)(5) and (1) of The Act By Failing To Supply The Union With Requested Information Concerning Insurance Coverage of Bargaining Unit Employees and By Misleading the Union As To Its Intentions Regarding the Security Trust Plan

A. The Failure to Supply Information

The facts demonstrate that the Employer completely disregarded the Union's requests for a copy of the Security Trust Plan. Although agreeing to supply the Union with a copy of the Plan on at least two occasions (February and June 1967) the Company simply failed to deliver it until August 1968, well after the death of Mr. Racely (supra, pp. 9-10). Not coincidentally, it was finally given to the Union shortly after the filing of the Charge herein alleging that the failure to supply the Plan was a violation of the Act.

There can be no question that the Company was under a statutory duty to provide such information within a reasonable time; for such information was relevant not only to the bargaining issues concerning insurance and pension coverage, but also to any questions concerning the coverage which may arise in the day-to-day representation of bargaining unit employees. NLRB v. Truitt Mfg. Co., 351 U.S. 149, 151-153; Curtiss-Wright Corp. v. NLRB, 347 F. 2d 61, 65, 69-70 (3rd Cir., 1963); May Aluminum, Inc., 160 NLRB #48, enforced 398 F. 2d 47 (5th Cir., 1968). These cases amply support our contention that the Company's failure to supply the requested information within a reasonable time constituted a violation of §8(a)(5) and (1) of the Act.

The Trial Examiner did not reject these principles. Rather, he overlooked some critical facts in the record and in so doing, he found that a violation was not proven. We submit that his reliance on McIntyre's statement (A-46) that the Employer "hadn't refused" to give him the information is misplaced; for as McIntyre later stated, in answer to a question less misleading, "they [the Company negotiators] agreed to give it to me, but just never did" (A-70-71, see also A-51). His testimony was amply corroborated by that of Ivon Booth who stated that the Union asked for the Plan on those two occasions, and that the Company negotiators agreed to give it to the Union, but never did (until August 1968) (A-98-100, 108). We should not ignore the fact that McIntyre and Booth were credited over Williams on every other fact issue. Williams' testimony was as vague and equivocal on this point as on the others about which he testified. We submit that had the Trial Examiner not overlooked the cited explanation by McIntyre, he would have reached the same result again. Accordingly, we submit that the Union did request a copy of the Plan, and that the Employer failed to give it to the Union within a reasonable time, in violation of §8(a)(5) and (1) of the Act.[17/] [The Board never discussed this point. See Tiidee Products, supra.]

The Company's reason for not giving the Union the Plan is clear. It wanted to keep this Plan tightly within its own hands to avoid possible Union

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17. The Company's 10(b) argument lacks merit for the Company had not supplied the Plan to the Union right up to the date the Charge was filed, thereby violating the Act well within the 10(b) period.

requests for changes and improvements. This explains its failure to give a copy to the Union. It explains the Company's actions in misleading the employees and the Union regarding the employees' coverage during the strike. And it explains why the Company deliberately misled the Union into believing that the insurance coverage would be maintained by Union payment of premiums, when in fact it was not maintained. Only after the institution of these proceedings did the Company ever openly attempt to explain the operation of the Plan, and then it did so only to the Trial Examiner.

B. Misleading the Union

As the Statement of Facts shows, the Union on April 29 asked the Employer to continue in effect during the strike the employees' life insurance with the Union paying the premiums. The Employer told the Union that it would do so, provided the Union paid the premium to the Employer in a lump sum. The Union agreed to do so and justifiably assumed that the striking employees' insurance would remain intact. 18/ What the Union did not know was that the Company had other plans. It decided to punish its striking employees by withholding from them the right to continue paying the life insurance premiums falling due under the Security Trust Plan (supra) and rather than reveal this to the Union, the Company decided to withhold that fact and lead the Union to believe otherwise.

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18. The Company contention that the "death benefit" differed from the group life insurance request made by the employees is without merit. The Plan itself (A-300-314) provides that a group life insurance policy will be provided for the members' coverage. The information booklet (A-321) states that a group life insurance policy existed (supra, p. 4). The policy allegedly given the employees says it is subject to a "master policy" (A-310-311). We submit that the Trial Examiner was correct in finding that the Union's request for "life insurance" covered this policy.

These facts demonstrate that the Company bargained in bad faith with the Union concerning the continued insurance coverage of the bargaining unit employees during the strike. It did so by intentionally withholding information, which it had in its possession, by assenting to a Union request without having any intention of carrying it out, and by telling a half-truth and leaving out facts in order to induce in the Union an unfounded feeling of cooperation. By inducing the Union into believing it had an agreement concerning all of the insurance for the duration of the strike, through the use of such tactics, the Company violated §8(a)(5) and (1) of the Act. The very least §§8(a)(5) and 8(d) require is "good faith" bargaining. "Good faith" includes as part of its definition "honesty." NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152 ("Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims.") We submit that bargaining in bad faith in order to induce a Union to believe that it had an agreement (e.g., that the Union would be allowed to pay the premiums thus maintaining the policy) is no less unlawful than bargaining in bad faith in order to induce a union to reject a proposal. See, e.g., H. K. Porter, 153 NLRB 1370, enforced, 124 App. D.C. 143, 363 F. 2d 272 (D.C.Cir. 1966), cert. denied 385 U.S. 851, clarified, 128 App. D. C. 344, 389 F. 2d 295 (D.C.Cir. 1967), where the Board with Court approval found that the employer was bargaining in bad faith by advancing a false reason in support of its position against Union security and checkoff clauses.

In addition, the Company has taken the position that the employees' insurance expired when the employees went on strike. This action constitutes

a repudiation of the agreement struck when it said that it would allow the Union to keep the premium payments current. §8(d)'s "good faith" requirement requires that an employer honor its agreements and live up to its statements. Repudiation of an agreement or entering an agreement without intending to honor it, therefore, is contrary to the definition of good faith bargaining and constitutes a violation of §8(a)(5) of the Act. Cf. Hyde Super Market, 145 NLRB 1252, 1253, enforced 339 F. 2d 568 (9th Cir., 1964); Crescent Building Co., 157 NLRB 296, 298-299. The facts here show that the Company has done exactly what the Act and the above-cited cases prohibit--it entered into an agreement (or, at least led the Union to believe it had done so) without any intention of honoring it.

The Company in seeking to excuse its conduct, claims that the Union should have known that the Company only intended to allow the Union to pay for one group life insurance policy and not the other. This, we submit, is patently without merit. The Union is entitled to take the Company at its word. The Union asked about paying for the employees' "life insurance." The Company said that it could do so. The Union was entitled to accept that at face value. This is especially true since Williams, the Company negotiator made no effort to explain to the Union that only one policy would be continued.[19/] Indeed, the Company undertook to further mislead the Union regarding its intentions. As noted above, Booth,

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19. See n. 13, supra, p. 19.

"asked Mr. Waters about our security trust, how that would be taken care of, and he said he didn't know, but that he would let me know." (A-101, emphasis added).

Booth's testimony continued as follows:

"Q Did you have some discussion with Mr. Waters about the insurance itself?

A Yes.

Q What was that?

A About our hospitalization and other life insurance and the security trust plan.

Q What did Mr. Waters say about the other insurance?

A He didn't know for sure whether the UAW would pick it up or not. He was rather doubtful that they would. And I told him I had been told by Mr. McIntyre that they would. The company would continue paying it, and would bill the UAW for it. That they would pick up the tab on it.

Q Was there any discussion as to whether individual payments were to be made on the insurance?

A I wanted to know what happened to it, and to find out for us what we could do about it, if we had to pay it individually, or the UAW was going to pick it up, or if they could pick it up. I just wanted to know what it was all about because many employees asked me about it, members of our union, as to what happened to it.

TRIAL EXAMINER: What did he say?

THE WITNESS: He said he didn't know, but that he would let me know. He would find out.

Q (By Mr. Niforos) Did Mr. Waters subsequently inform you as to how the payments were to be paid? How they were to be made?

A No. He never let me know." (A-102-103, emphasis added)

Booth credibly testified that Waters never called him.

In addition, employee Howard Currens, concerned about the Trust Plan because of his advancing years (he was 63 and near retirement), attempted, on his own to "learn what the situation really was" (A-416). Currens first spoke with Waters and said that he heard that the Company "was picking up our insurance and trust fund, and that the union would repay them" and he asked if Waters knew anything about it. Waters answered that he did not (A-416; 73-74). Currens then asked company Insurance Manager Loftis the same question, and upon receiving an equivocal answer (A-74) also asked:

> "[I]f I could pay my own, because at my age it was serious business, and I was there to take care of it." (A-74).

Loftis responded that "it was out of his hands" (id). Currens then approached James Sharkey, company Vice-President of finance and said:

> "I had just come home [from vacation] and I heard about what happened [Racely's death], and I was there to pay my trust fund and my insurance, and I wanted to pay it six months in advance, because I didn't know how long I was going to be out." (A-75).

Sharkey stated, "Howard, I will call you at your home at two p.m.." whereupon Currens went home and waited for the call (A-75). Sharkey never called (A-75-76). Currens' testimony was not contradicted.

Thus, the record demonstrates that the Company, on at least four occasions told representatives and members of the Union either that it would

continue the "group life insurance" program (McIntyre-Williams discussion) or that it did not know, but would check and convey the information to the Union (two Booth-Waters discussions, and the Currens-Waters, Loftis, and Sharkey discussions). However, the Company never did notify the Union or any of its representatives or members that it was not continuing the Plan or the Plan's group life insurance policy. Nor did it tell the Union or its representatives or members that it understood the Union's request to include only the one group life insurance policy and not the other. Rather, it billed the Union for "Basic Group Life Insurance" (A-358-363) and refused to answer Booth's and Currens' later direct questions concerning the Plan or its Group Life Insurance Policy. [20] It would be hard to conceive of a more cleverly conceived policy designed to confuse and mislead a Union. [21]

Likewise the Company's argument that the Union should have realized that only one policy was being continued when it received the bill on May 23 is without merit. The bill (A-358-363) stated that it was being rendered,

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20. The Board never considered this aspect of the Complaint dealing with the Company's misleading the Union. See Tiidee Products, supra.

21. This evidence also renders meritless the Company's claim of ignorance as to what the Union was asking for. As the Trial Examiner found (A-414-415, 421) McIntyre asked for life insurance coverage. However, even if there was some doubt in the Company's mind as to what was being sought that was surely cleared up by Booth who specifically indicated to Waters that the Union was expecting to pay for all of the life insurance premiums, including the Security Trust Plan and its policy (A-415, 421). Thus, the Board's finding is without support in the record once the credibility resolutions are straightened out.

inter alia, for "Basic Group Life Insurance". The tab sheet attached merely contained some columns of numbers without any indication as to their meaning. There was no way that Booth, McIntyre, or anyone in the UAW's Strike Insurance Department could tell from that information, that the billing covered only part of the life insurance. Further, since the Company never supplied the UAW with a copy of the Plan and never explained the Plan to the UAW negotiators, it is understandable that McIntyre and Booth were both unsure as to whether there was one insurance policy or two, or as to exactly how the Security Trust Plan operated. Indeed, even Williams, and the other Company officials testified that they did not understand the operation of the Plan (A-159-162, 170-171, 187).

Accordingly, the Company's actions in misleading the Union, and in falsely inducing the Union to believe that it would allow the continuation of the life insurance policy in question herein, when in fact it planned to do otherwise, constitute bad faith bargaining at its worst, in violation of §8(a)(5) and (1) of the Act. A direct consequence of this Company action was that the Union did not make other insurance arrangements and Racely, at his death, was not covered by life insurance to the extent he would have been had the Company acted otherwise. Therefore, the Trial Examiner was entirely correct in ordering the Company to make his beneficiary whole for this violation and the Board erred in refusing to adopt it.

C. The Unilateral Action

The Security Trust Plan contained provisions regarding an employee-member's rights under it. The booklet given employees by the employer fairly outlined these rights. Basically, once an employee qualified and became a

member, the employee stayed a member until he terminated membership by asking for his contributions back. Upon termination of employment he could convert his life insurance coverage to an individual policy. While a member, the employee could continue making his contributory payments in order to preserve his insurance protection under the Plan and this has been done in the past. This Plan most certainly is a "term of employment" and we doubt that the Company would argue otherwise.

The law is crystal clear that an employer may not change any terms of employment without prior bargaining with the bargaining representative of the employees in the unit. NLRB v. Katz, 369 U.S. 736. This is true irrespectiv of the employer's motiviation. id. Yet despite the Act's requirements of prior good faith bargaining, the Company here unilaterally acted to prevent its employees from making their periodic contributions to the Plan and thereby maintain their insurance protection. This action effectively withdrew from the bargaining unit employees a term of their employment--the right to continue their insurance by making their payments. The action was taken by the Employer without bargaining with the Union. It was just done. Therefore it violates §8(a)(5) of the Act. 22/ Again, a consequence of this action was that Racely died without protection he otherwise would have had, and therefore the Company must make his beneficiary whole in order that the violation be remedied.

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22. The fact that it was done to punish employees for going on strike or restrain them from doing so (either in the then present situation or in the future),(see Great Dane Trailers, quoted supra, 388 U.S. at 32) makes this action a violation of §8(a)(3). The fact that it was done without notice or bargaining with the Union makes it a violation of §8(a)(5).

CONCLUSION

For the above reasons we respectfully urge that the Board's Decision and Order be set aside and that the order recommended by the Trial Examiner be issued. Alternatively we respectfully urge that this case be remanded to the Board with instructions to affirm the Trial Examiner's decision and to issue an appropriate remedial order.

Respectfully submitted,

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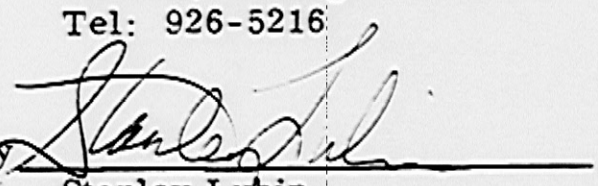
By 
Stanley Lubin

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